9

No. 98-1255-CFY Title: United States, Petitioner
v.
Abel Martinez-Salazar

Docketed: February 5, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 23 1998	Application (98A522) to extend the time to file a petition for a writ of certiorari from January 5, 1999 to February 4, 1999, submitted to Justice O'Connor.
	Jan 4 1999	Application (98A522) granted by Justice O'Connor extending the time to file until February 4, 1999.
	Feb 4 1999	Petition for writ of certiorari filed. (Response due March 21, 1999)
	Mar 4 1999	Order extending time to file response to petition until March 21, 1999.
	Mar 17 1999	Brief of respondent Abel Martinez-Salazar in opposition filed.
	Mar 17 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Mar 31 1999	DISTRIBUTED. April 16, 1999
	Mar 31 1999	Reply brief of petitioner United States filed.
	Mar 31 1999	Reply brief of petitioner United States (TBP) filed.
	Jun 14 1999	REDISTRIBUTED. June 17, 1999
	Jun 21 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 21 1999	Petition GRANTED. SET FOR ARGUMENT November 29, 1999. **********
	Jun 30 1999	Motion of respondent for appointment of counsel filed.
	Aug 2 1999	Motion for appointment of counsel GRANTED and it is ordered that Michael D. Gordon, Esquire, of Tempe, Arizona, is appointed to serve as counsel for the respondent in this case.
	Aug 3 1999	Order extending time to file petitioner's brief on the merits to and including August 13, 1999
	Aug 13 1999	Joint appendix filed.
	Aug 13 1999	Brief of petitioner United States filed.
	Aug 16 1999	Order extending time to file respondent's brief on the merits to and including October 4, 1999.
	Sep 30 1999	Brief of respondent Abel Martinez-Salazar filed.
	Oct 4 1999	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Oct 6 1999	CIRCULATED.
	Nov 5 1999	Reply brief of petitioner United States filed.
	Nov 19 1999	Record filed.
	Nov 29 1999	ARGUED.

1PP

No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

65pp

QUESTION PRESENTED

Whether a defendant is entitled to automatic reversal of his conviction when he uses a peremptory challenge to remove a potential juror whom the district court erroneously failed to remove for cause, and he ultimately exhausts his remaining peremptory challenges.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules: Page

In the Supreme Court of the United States

OCTOBER TERM, 1998

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 146 F.3d 653.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998 (App., *infra*, 20a-21a). On January 4, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including

February 4, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Section 2111 of Title 28 of the United States Code provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 24(b) of the Federal Rules of Criminal Procedure provides:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 52(a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent Abel Martinez-Salazar was found guilty of conspiracy to possess heroin with intent to distribute it (21 U.S.C. 846), possession of heroin with intent to distribute it (21 U.S.C. 841(a)(1)),

and using or carrying a firearm during and in relation to a drug trafficking offense (18 U.S.C. 924(c)(1)). App., *infra*, 2a. He was sentenced to 123 months' imprisonment. Gov't C.A. Br. 3-4. Respondent appealed, and the court of appeals found an impairment of his right of peremptory challenges that, it held, "require[d] automatic reversal." App., *infra*, 3a.

1. Respondent and a co-defendant were tried and convicted on drug and weapons charges. Before trial, prospective jurors filled out a jury questionnaire. App., *infra*, 3a. A potential juror named Don Gilbert indicated on his questionnaire that he would favor the prosecution. *Ibid.* The district court subsequently advised the potential jurors, as a group, that the indictment is not evidence, that the government bears the burden of proof beyond a reasonable doubt, that defendants are presumed innocent, and that the jury is to determine guilt or innocence based on the evidence and the law as explained to it by the court. 12/7/93 Tr. 38-41. Gilbert gave no response when the district court asked whether any potential juror disagreed with those legal principles. *Id.* at 40, 42. Gilbert also gave no response when the district court asked whether any juror believed that he could not serve fairly and impartially. *Id.* at 44.

The district court also questioned Gilbert individually. During that questioning Gilbert indicated that "all things being equal, [he] would probably tend to favor the prosecution," App., *infra*, 4a, that he assumed that "people are on trial because they did something wrong," *id.* at 5a, and that he did not know whether a juror holding his opinions could give the defendants a fair trial, *id.* at 4a. Gilbert also indicated, however, that he did not disagree with the principle that the government bore the burden of proof beyond a reasonable doubt,

and that he understood in theory that defendants are presumed innocent. *Id.* at 4a-5a.

Respondent and his co-defendant challenged Gilbert for cause. The district court denied the challenge on the ground that Gilbert had indicated that he would be able to follow the court's instructions. 12/7/93 Tr. 102-103. Respondent and his co-defendant were jointly allotted ten peremptory challenges for use in the selection of regular jurors, and an additional challenge for use in the selection of the alternate juror. App., *infra*, 3a. The government was allotted six peremptory challenges for use in the selection of regular jurors, and an additional challenge for use in the selection of an alternate. 12/7/93 Tr. 107. The defense used one peremptory challenge to remove Gilbert, and eventually exhausted its allotted eleven challenges. App., *infra*, 6a.

2. The court of appeals reversed respondent's convictions based on the impairment of respondent's right of peremptory challenge. App., *infra*, 1a-19a. It first held that the district court abused its discretion by refusing to excuse Gilbert for cause. *Id.* at 7a-8a. Relying on this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the court held that the error did not constitute a violation of the Sixth Amendment, because Gilbert did not actually sit on the jury. App., *infra*, 9a. The court held, however, that the error amounted to a violation of respondent's right to due process under the Fifth Amendment. The court reasoned that the defense was forced to use a peremptory challenge to remove a juror who should have been removed for cause, and that it was thereby effectively denied a peremptory challenge to which it was entitled by law.[1] *Id.* at 9a-14a. The court held that, because respondent was denied the right to use his full complement of peremptory challenges as he saw fit, automatic reversal was required without any inquiry into harmless error. *Id.* at 14a-15a.

Judge Rymer dissented. App., *infra*, 15a-19a. She concluded that the loss of a peremptory challenge does not amount to a constitutional violation. *Id.* at 15a. In any event, Judge Rymer explained, respondent never suggested to the district court that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Gilbert. *Id.* at 16a. Judge Rymer therefore concluded that there was no indication that respondent was adversely affected by the district court's refusal to remove Gilbert for cause. *Ibid.* Judge Rymer further stated that respondent could obtain relief only if he could establish plain error, because he had not adequately preserved an objection based on the denial of his right to exercise peremptory challenges. *Id.* at 16a-17a. Finally, Judge Rymer concluded that respondent had failed to demonstrate plain error, because he could show no prejudice and because it was far from clear that the use of a peremptory challenge to remove a juror who should have been excluded for cause amounts to a due-process violation, or even a denial of the right to peremptory challenges provided by Rule 24

---

[1] In a brief to the panel, the government conceded that it violates due process to require a defendant to use a peremptory challenge to remove a juror who should have been removed for cause. Gov't C.A. Supp. Br. 9-12. The court of appeals did not rely on that concession, but instead "independently conclude[d]" that respondent's due-process rights had been violated. App., *infra*, 9a n.4. In its petition for rehearing, with suggestion for rehearing en banc, the government retracted that concession by arguing that no due-process violation occurs in that situation. Pet. for Reh'g 9-10.

of the Federal Rules of Criminal Procedure. App., *infra*, 17a-18a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that, when a defendant uses a peremptory challenge to remove a juror who should have been excused for cause, and he later exhausts his allotted challenges, the defendant's Fifth Amendment due-process rights have been violated and the violation compels reversal, without any inquiry into harmless error. App., *infra*, 3a. That holding creates a square conflict among the courts of appeals. The Eighth, Tenth, and Eleventh Circuits have all held that such an error does not amount to a constitutional violation and does not require reversal unless prejudice is shown. The court of appeals' holding is also incorrect. A defendant's right to exercise peremptory challenges is not of constitutional dimension, and his exhaustion of his peremptory challenges by using one to remove a juror who should properly have been removed for cause is not even a clear impairment of his rule-based rights. Morever, this Court's harmless-error cases, a federal statute, 28 U.S.C. 2111, and Federal Rule of Criminal Procedure 52(a) make clear that *all* errors in federal criminal trials are subject to harmless-error analysis. Under a proper application of harmless-error doctrine, the error in this case did not affect respondent's "substantial rights," Fed. R. Crim. P. 52(a), and did not warrant reversal.[2] Because the issue in this case is

[2] The government contended in the court of appeals that the district court did not abuse its discretion by refusing to excuse Gilbert for cause. See, *e.g.*, Gov't C.A. Supp. Br. 6-9. Because the contrary conclusion of the court of appeals does not present a legal question of general importance, the government does not seek review of that conclusion in this Court and therefore assumes for

recurring and important, the court of appeals' erroneous holding warrants this Court's review.

1. There is a square conflict among the courts of appeals about whether reversal is required when the trial court in a criminal case erroneously denies a defense motion to remove a potential juror for cause, thereby causing the defendant to use a peremptory challenge to remove that potential juror. The Ninth Circuit held in this case that if the defense later exhausts its challenges, such an error amounts to a violation of the defendant's due-process rights and requires automatic reversal. App., *infra*, 1a-19a. The Fifth Circuit has recently articulated the same principle of per se reversal (without, however, resting on a due-process theory). See *United States* v. *Hall*, 152 F.3d 381, 408 (1998) (relying on *United States* v. *Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)), petition for cert. pending, No. 98-7510 (filed Dec. 29, 1998).

In contrast, the Eighth, Tenth, and Eleventh Circuits have held that such an error is not of constitutional dimension and does not require reversal absent a showing of prejudice—generally speaking, unless a biased juror is seated. See, *e.g.*, *United States* v. *Gibson*, 105 F.3d 1229, 1233 (8th Cir. 1997); *United States* v. *McIntyre*, 997 F.2d 687, 698 n.7 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994); *United States* v. *Farmer*, 923 F.2d 1557, 1566 & n.20 (11th Cir. 1991).[3]

present purposes that the district court should have excused Gilbert for cause. Cf. *United States* v. *Lane*, 474 U.S. 438, 444 n.5 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 n.4 (1983).

[3] There is a corresponding conflict among the courts of appeals in civil cases. Compare *Kirk* v. *Raymark Indus.*, 61 F.3d 147, 158-162 (3d Cir. 1995) (reversal required if civil litigant uses peremptory challenge to remove potential juror whom district court erroneously refused to remove for cause), cert. denied, 516 U.S.

Respondent's convictions would have been affirmed in any of the latter three circuits.[4]

2. The decision of the court of appeals rests on two propositions: that requiring respondent to use a peremptory challenge to remove a juror who should have been excused for cause violated his due-process rights, and that such an error can never be harmless. Both propositions are incorrect.

a. A defendant has no constitutional right to peremptory challenges; the existence of any such right is solely the product of statute or rule. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). In *Ross*, this Court rejected the view that a state court's erroneous refusal to remove a juror for cause, thereby requiring the defendant to use one of his peremptory challenges to remove the juror, violated the defendant's Sixth Amendment right to an impartial jury. 487 U.S. at 87-88. "So long as the

---

1145 (1996), with *Getter* v. *Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995) (finding harmless error in same circumstances), cert. denied, 516 U.S. 1146 (1996).

[4] Two other courts of appeals have decided cases holding that reversal is not required when a defendant exercises a peremptory challenge to remove a potential juror who erroneously was not removed for cause. See, *e.g.*, *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994); *United States* v. *Nururdin*, 8 F.3d 1187, 1190-1191 (7th Cir. 1993), cert. denied, 510 U.S. 1206 (1994). The law in both of those courts, however, is unclear in light of subsequent or contrary decisions. See pp. 16-17 & n.9, *infra*. Conversely, the Fourth Circuit has held that reversal is required when a defendant exercises a peremptory challenge to remove a potential juror who erroneously was not removed for cause. See *United States* v. *Rucker*, 557 F.2d 1046, 1049 (1977). Subsequent decisions make clear that the law in the Fourth Circuit is unsettled. See p. 17 n.9, *infra*.

jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88. The Court in *Ross* also concluded that requiring Ross to use a peremptory challenge to remove a juror who should have been excused for cause did not deprive Ross of his rights under the Due Process Clause. *Id.* at 89-91. The Court reached that result because the Oklahoma courts require defendants to use a peremptory challenge to rectify a trial court's error in denying a for-cause challenge, *id.* at 90, and Ross, therefore, "received all that [state] law allowed him." *Id.* at 91.

Even assuming that the federal rule is different, and that respondent's right to exercise peremptory challenges was impaired by the district court's erroneous for-cause ruling, that impairment does not amount to a violation of respondent's rights under the Due Process Clause. The right of federal criminal defendants to exercise peremptory challenges is created by federal rule, not the Constitution. Such challenges "are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). Although the violation of a non-constitutional rule of procedure may in unusual circumstances rise to the level of a due-process violation, see, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) (denial of state-law right to adjudicatory procedures), the general rule is that such a violation does not make out a due-process claim unless the violation "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The district court's error in refusing to excuse a potential

juror for cause simply required the defense to use one of its peremptory challenges to achieve the same purpose; that consequence cannot reasonably be said to have deprived respondent of a fair trial.

Indeed, it is not even clear that respondent's rule-based right to exercise challenges was impaired. This Court has not decided whether, as a matter of federal law, defendants must use a peremptory strike to remove a biased juror in order to challenge on appeal a trial court's denial of a for-cause challenge. The few decisions of the courts of appeals expressly addressing the issue appear to point in different directions. Compare *Frank* v. *United States*, 42 F.2d 623, 630 (9th Cir. 1930) ("It is uniformly held that where challenge for actual bias is denied and the defendant has an opportunity to eliminate the juror by exercising a peremptory challenge and fails to do so, he cannot thereafter complain of the ruling denying his challenge unless and until he has otherwise exercised all his peremptory challenges.") (citing numerous state cases),[5] with, *e.g.*, *United States* v. *Mobley*, 656 F.2d 988, 989-990 (5th Cir. 1981) (permitting defendant to raise objection on appeal to trial court's denial of for-cause challenges where defendant exhausted peremptory challenges but did not use them against jurors whom he had challenged for cause).

The better approach is to require defendants to use their peremptory challenges to cure trial courts'

---

[5] Cf. *Pickens* v. *Lockhart*, 4 F.3d 1446, 1450-1451 (8th Cir. 1993) (denying federal habeas relief because Arkansas law requires that defendants use peremptory challenges to cure trial court's erroneous denial of for-cause challenges), cert. denied, 510 U.S. 1170 (1994); *Adams* v. *Aiken*, 965 F.2d 1306, 1317-1318 (4th Cir. 1992) (same as to South Carolina law), vacated and remanded on other grounds, 511 U.S. 1001 (1994).

erroneous denials of for-cause challenges. As the Court noted in *Ross*, peremptory challenges are "a means to achieve the end of an impartial jury." 487 U.S. at 88. It is entirely consistent with that purpose to require that defendants use their peremptory "challenges to cure erroneous refusals by the trial court to excuse jurors for cause." *Id.* at 90. Such a requirement reasonably "subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Ibid.*

In any event, a defendant's right to exercise peremptory challenges would be impaired only if the defendant wanted to remove one of the jurors who actually sat, but could not do so only because he had exhausted his peremptory challenges in removing the potential juror who should have been excused for cause. The mere fact that a defendant exhausts his peremptory challenges does not establish that his exercise of peremptory challenges has been impaired by the erroneous denial of a for-cause challenge. It may well be that the defendant in such a case is content with the jurors who are seated, and would not have exercised a peremptory challenge against any of them even if the district court had properly removed the disputed potential juror for cause. It is for that reason that many courts properly require "some objection from the defendant after the exhaustion of his peremptory challenges." *Frank*, 42 F.2d at 631. See also, *e.g.*, *id.* at 630-631 (citing numerous state cases); *Turro* v. *State*, 950 S.W.2d 390, 406 (Tex. App. 1997, pet. ref'd); *Trotter* v. *State*, 576 So. 2d 691, 692-693 (Fla. 1990); *People* v. *Schafer*, 119 P. 920, 921 (Cal. 1911) ("It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and

would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed.").[6]

b. The court of appeals also erred by applying a rule of automatic reversal. The decisions of this Court, and a controlling federal statute and rule, establish that errors impairing the exercise of peremptory challenges are subject to harmless-error analysis.

Like many of the decisions that apply a rule of per se reversal to errors impairing the exercise of peremptory challenges, the decision of the court of appeals in this case relied heavily on this Court's dictum in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). App., *infra*, 9a-10a ("[A] denial or impairment of the right to exercise peremptory challenges 'is reversible error without a showing of prejudice.'") (quoting *Swain*, 380 U.S. at 219). *Swain* in turn relied upon a series of early decisions from this Court reversing criminal convictions on the basis of errors impairing defendants' exercise of their peremptory challenges. 380 U.S. at 219 (citing *Harrison* v. *United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry.* v. *Shane*, 157 U.S. 348, 351 (1895); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).

[6] In her dissent, App., *infra*, 16a, Judge Rymer concluded that respondent had failed to indicate to the district court that he would have exercised an additional peremptory challenge if one had been available. In his response to the government's petition for rehearing, respondent contended (at 4-5, 8-9, 15) that, to the contrary, the trial record indicated that respondent would have exercised an additional peremptory challenge if one had been available. That case-specific dispute, however, is irrelevant under the approach adopted by the court of appeals, which requires only that a defendant exhaust his peremptory challenges. App., *infra*, 13a. See also, *e.g.*, *Vansickel* v. *White*, No. 97-17143, 1999 WL 31457, at *12 n.2 (9th Cir. Jan. 27, 1999) (Reinhardt, J., dissenting).

The early decisions of this Court upon which the dictum in *Swain* rests, however, were "decided long before the adoption of Federal Rule[] of Criminal Procedure * * * 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. § 2111." *Lane*, 474 U.S. at 444 (overruling similar early case holding that misjoinder of charges requires automatic reversal). Section 2111 of Title 28 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Court has repeatedly held that *all* errors in federal criminal proceedings are subject to the harmless-error inquiry mandated by Section 2111 and Rule 52(a).[7] See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *Lane*, 474 U.S. at 444-449 & n.11; cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (rejecting claim that

[7] If no proper objection is made in the district court, however, errors in criminal cases are reviewed under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993).

Court should carve out exception to Rule 52 for "structural error[s]"; Rule 52 "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. * * * Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.").

More specifically, this Court has relied upon Section 2111 and Federal Rule of Civil Procedure 61—a civil analogue to Rule 52(a)—in determining whether an impairment of the exercise of peremptory challenges justified granting a new trial in a civil case. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) ("We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered citadels of technicality. The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.") (quotation marks and citations omitted). Those authorities establish that the court of appeals erred by applying a rule of per se reversal rather than conducting the inquiry, required by this Court's cases, by Section 2111, and by Rule 52(a), into whether any error affected respondent's substantial rights.

The error in this case did not affect respondent's substantial rights. In general, in order to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734

(1993);[8] see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The error in this case cannot reasonably be supposed to have had any such effect.

Nor does the error in the present case fall within the narrow category of fundamental constitutional errors that require reversal even if they have no effect on the outcome of trial proceedings. See, *e.g.*, *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). One example of such an error is the seating, over the defendant's objection, of an actually biased juror. See, *e.g.*, *Rose*, 478 U.S. at 578; *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966). But where no actually biased juror is seated, errors affecting the exercise of peremptory challenges will rarely, if ever, affect a substantial right of a defendant. Cf. *Ross*, 487 U.S. at 91 n.5 (noting that Ross made no claim that the "trial court repeatedly and deliberately misapplied the law in order to force [him]

---

[8] When the error in question is of constitutional dimension, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Although the court of appeals held in the present case that the error at issue violated respondent's rights under the Due Process Clause (App., *infra*, 9a), that holding is incorrect. See pp. 8-12, *supra*.

to use his peremptory challenges to correct these errors").

It is undisputed in this case that all of the seated jurors were impartial. Even if respondent would have exercised one additional peremptory challenge against one of the jurors who sat, an error having only that consequence would not "affect [respondent's] substantial rights," 28 U.S.C. 2111, and would not justify reversal of respondent's convictions.

3. a. This case presents important and recurring issues of federal law. Defense challenges for cause are a feature of virtually every jury trial, and district courts often must rule on many such challenges in a single case. It should therefore not be surprising that the courts of appeals have frequently grappled with the question whether and in what circumstances the erroneous denial of a for-cause challenge warrants reversal of a criminal conviction. See pp. 7-8, *supra* (citing cases); see also, *e.g.*, *United States* v. *Brooks*, 161 F.3d 1240, 1246 (10th Cir. 1998); *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997), cert. denied, 118 S. Ct. 702 (1998); *United States* v. *Cruz*, 993 F.2d 164, 168-169 (8th Cir. 1993); *United States* v. *Towne*, 870 F.2d 880, 885 (2d Cir.), cert. denied, 490 U.S. 1101 (1989); *United States* v. *Mercer*, 853 F.2d 630, 632 (8th Cir.), cert. denied, 488 U.S. 996 (1988) and 490 U.S. 1101 (1989). This Court should grant review to resolve the conflict among the courts of appeals on that question.

Granting review in this case would also provide the Court with an opportunity to shed light on a broader conflict among the courts of appeals on the question whether impairments of a criminal defendant's right to exercise peremptory challenges require automatic reversal. Like the Ninth Circuit in this case, the First, Third, Fifth, Sixth, and Seventh Circuits have held that such errors are not subject to harmless-error analysis and therefore require automatic reversal. See, *e.g.*, *United States* v. *Serino*, 161 F.3d 91, 93 (1st Cir. 1998); *United States* v. *Ruuska*, 883 F.2d 262, 267-268 (3d Cir. 1989); *Hall*, 152 F.3d at 408 (5th Cir.); *United States* v. *McFerron*, No. 97-5161, 1998 WL 898493, at *4-*5 (6th Cir. Dec. 29, 1998); *United States* v. *Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), cert. denied *sub nom.* *United States* v. *Messino*, 118 S. Ct. 2341 (1998); see also *United States* v. *Annigoni*, 96 F.3d 1132, 1134 (9th Cir. 1996) (en banc). As noted above, the Eighth, Tenth, and Eleventh Circuits disagree.[9] That conflict is of great significance. Peremptory challenges are exercised in every jury trial, and there are a variety of ways in which a district court might commit error affecting a defendant's exercise of peremptory challenges. The widespread disagreement among the courts of appeals on the question whether such errors invariably require reversal underscores the need for guidance from this Court.

---

[9] The law in several other circuits is internally inconsistent or unclear. Compare *United States* v. *Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996) (errors impairing defendant's exercise of peremptory challenges require per se reversal) (dicta; citing *Carr* v. *Watts*, 597 F.2d 830, 833 (2d Cir. 1979)), cert. denied, 519 U.S. 1098 (1997), with *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994) (finding error impairing defendant's exercise of peremptory challenges to be harmless). Compare also *United States* v. *Love*, 134 F.3d 595, 600-603 (4th Cir.) (error impairing exercise of peremptory challenges requires reversal only if prejudice is shown), cert. denied, 118 S. Ct. 2332 (1998), with *United States* v. *Ricks*, 802 F.2d 731, 734 (4th Cir.) (en banc) (errors impairing exercise of peremptory challenges require per se reversal), cert. denied, 479 U.S. 1009 (1986).

b. The United States filed a petition for a writ of certiorari last Term, in *United States* v. *Messino*, No. 97-1641 (cert. denied June 22, 1998), seeking resolution of the broader conflict among the courts of appeals discussed above. The respondents in *Messino* opposed certiorari, arguing that the case arose in an unusual context, *i.e.*, the failure of a district court to give the defendant accurate notice of jury-selection procedures, that there was no conflict among the courts of appeals in that particular context, and that a decision of the case might "require this Court to embark upon a fact-resolution journey." 97-1641 Br. in Opp. at 14-16, 17. We acknowledged that there was no conflicting decision involving facts like those in *Messino*, although we believed that the legal issue of harmlessness was properly presented. 97-1641 U.S. Reply Br. at 3. Whatever may be said about *Messino*, there is no question in this case that a conflict exists and that the legal issue presented is a characteristic one in peremptory-challenge litigation.

As we have explained, see p. 7, *supra*, there is a square conflict among the courts of appeals about whether reversal is required in the circumstances of this case: when the trial court in a criminal case erroneously denies a defense motion to remove a potential juror for cause, thereby causing the defendant to use a peremptory challenge to remove that potential juror. The Ninth Circuit—the largest court of appeals in the country—has now joined the Fifth Circuit in holding that such an error can never be harmless, while the Eighth, Tenth, and Eleventh Circuits have found such errors to be harmless. That conflict warrants this Court's resolution. And this case also properly raises the broader conflict among the courts of appeals on whether errors impairing the exercise of a defendant's

peremptory challenges are subject to harmless-error analysis. The erroneous denial of a defendant's for-cause challenge to a potential juror is one of the most common settings in which that issue arises, and a decision here would illuminate the proper analysis of that issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

FEBRUARY 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10158

D.C. No. CR-93-00284-EHC
(District of Arizona)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ABEL MARTINEZ-SALAZAR, DEFENDANT-APPELLANT

[Argued and Submitted Dec. 16, 1994
Submission Vacated April 24, 1995
Re-argued and Submitted Nov. 21, 1996
Submission Vacated May 1, 1997
Resubmitted July 17, 1997
Decided May 28, 1998]

Before: REINHARDT, RYMER and HAWKINS,* Circuit Judges.

Opinion by Judge MICHAEL DALY HAWKINS; Partial Concurrence and Partial Dissent by Judge RYMER.

MICHAEL DALY HAWKINS, Circuit Judge

FACTS

Abel Martinez-Salazar ("Martinez-Salazar") was tried and convicted, along with a codefendant, of: (1)

---

* Following the death of Circuit Judge Thomas Tang, Judge Hawkins was drawn as his replacement on the panel.

conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; (2) possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(i); and (3) using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) ("gun count"). Martinez-Salazar appeals his convictions on all counts, claiming insufficiency of the evidence, improper jury instruction, and constitutional error in the jury selection process.

I. Sufficiency of the Evidence

Martinez-Salazar appeals the denial of his motion for acquittal as to his gun count conviction on the basis of insufficiency of the evidence.

It is clear under *Bailey v. United States*, 516 U.S. 137, 143-44, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), that Martinez-Salazar did not "use" a firearm, in the sense of "actively employing" it, so the only issue here is whether there was sufficient evidence to support his conviction under the "carry" prong of § 924(c)(1). We held in *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 318, 136 L. Ed. 2d 233 (1996), that a defendant "carries" a firearm in an automobile as long as it is "'about' his person, within reach, and immediately available for use." Here, Agent Rodriguez testified that Martinez-Salazar said that the gun was always in the car; the gun was located under the front passenger seat next to where the heroin had been; and Martinez-Salazar admitted that he sat in that seat on the way to the park meeting. The dispute at trial as to the gun count was not whether the gun was out of Martinez-Salazar's reach or otherwise unavailable to him, but whether he knew that it was in

the car. There was ample evidence to permit the jury to conclude that he did.

II. Jury Selection

Following the Supreme Court's seminal decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), courts have wrestled with the constitutional implications of jury selection in criminal cases. In *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc), for example, we surveyed the history of and rationale underlying peremptory challenges and held that the erroneous denial of a peremptory challenge was fundamental error requiring automatic reversal. Here we hold that the erroneous refusal to excuse a juror for cause violates a defendant's Fifth Amendment due process rights when it forces the use of a peremptory challenge to exclude that juror and, consistent with *Annigoni*, that such a denial requires automatic reversal.

Martinez-Salazar and his codefendant were allotted ten peremptory challenges to be exercised jointly in the selection of twelve jurors. *See* Fed. R. Crim. P. 24(b). They received one additional peremptory challenge to be used in the selection of the alternate juror. *See* Fed. R. Crim. P. 24(c).

Prior to trial, the district court gave prospective jurors a written questionnaire to complete. In response to a question essentially asking if the prospective juror knew of anything that might affect his ability to serve impartially, prospective juror Don Gilbert ("juror Gilbert") wrote the following:

"I would favor the prosecution."

When the jury venire was assembled, the district court engaged in the following colloquy with Mr. Gilbert:

THE COURT: On your questionnaire, you said in question number eight, the answer: "I would favor the prosecution." Is that—are you saying that you would not be able to listen to the evidence, and decide what happened, and follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?

JUROR GILBERT: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

THE COURT: You understand that one of the things the jury will be told, of course, is that the prosecution, the Government has the burden of proving someone guilty beyond a reasonable doubt. And I suppose realistically, all things being equal wouldn't be beyond a reasonable doubt. Would you disagree with that?

JUROR GILBERT: No, I guess I wouldn't disagree with that.

THE COURT: I guess the important question is—and perhaps let me ask it this way. It's kind of my question. But if you were the defendants here charged with this crime, and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?

JUROR GILBERT: I think that's a difficult question. I don't think I know the answer to that.

Martinez-Salazar's trial counsel, Mr. Garcia, then followed up by questioning juror Gilbert.

MR. GARCIA: If you were to error [sic], where would you feel more comfortable erring, in favor of the prosecutor or the defendant?

JUROR GILBERT: Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as I indicated on here, I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong.

THE COURT: Well, you see, you heard me out there when I started the trial. That's not the general proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption—

JUROR GILBERT: There's a—

THE COURT: —of guilty. The presumption is the other way. That's the way our system—

JUROR GILBERT: I understand that in theory.

THE COURT: Okay, all right, all right. Why don't you wait, and we'll be done here in a few minutes, okay? Thank you very much.

The record reflects no further conversations between juror Gilbert and the district court or counsel.

At the completion of the above inquiry, Martinez-Salazar's counsel challenged juror Gilbert for cause. Counsel for the government opposed the challenge, arguing, "Your honor, although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." The district court then refused the requested challenge

for cause, stating: "You know about him and know his opinions. He said he did say that he could follow the instructions, and he said he—'I don't think I know what I would do,' et cetera. So I think you have reasons to challenge him if you—strike him if you choose to do that. . . ." Defendants were thus forced to use one of their peremptory challenges to strike juror Gilbert and eventually exhausted their allotted eleven.

A. History of the Appeal on this Issue

This appeal itself has something of a history. When this case first came to this Court, Martinez-Salazar's then counsel took an *Anders v. State of California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967),[1] position with respect to whether the district court's refusal to dismiss juror Gilbert created a Sixth Amendment violation. Presumably, counsel took this position because of *Ross v. Oklahoma*, 487 U.S. 81, 88,

[1] Under *Anders*, an appointed defense counsel for an indigent on direct appeal may inform the court that all of the defendant's grounds for appeal are frivolous and may move to withdraw as counsel. Defense counsel must first file a so-called *Anders* brief "on behalf of the indigent defendant presenting the strongest arguments in favor of [his or her] client supported by citations to the record and to applicable legal authority." *United States v. Griffy*, 895 F.2d 561, 563 (9th Cir.), *appeal decided by* 904 F.2d 41 (9th Cir. 1990).

After receiving an *Anders* brief, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744, 87 S. Ct. 1396. If the court concludes that the appeal is frivolous, it may grant counsel's motion to withdraw and dismiss the appeal. "On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), which held that the erroneous denial of a challenge for cause that requires counsel to use a peremptory challenge does not create a Sixth Amendment violation. *See also United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993). Because *Ross*, by its language, did not decide whether such an erroneous denial constitutes a Fifth Amendment violation, we ordered supplemental briefing.[2] We also relieved Martinez-Salazar's then-counsel and appointed new counsel.

B. Analysis

1. The District Court's Refusal to Exclude a Properly Cause-Challenged Juror

Martinez-Salazar claims that the district court should have excused juror Gilbert for cause because of his admitted bias in favor of the prosecution. We agree.

A juror is deemed impartial "only if he can lay aside his opinion and render a verdict based on the evidence presented in court. . . ." *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Because the "'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge,'" we do not disturb a district court's decision to deny a challenge for cause absent a showing of abuse of discretion or manifest error. *United States v. Egbuniwe*, 969 F.2d 757, 762 (9th Cir. 1992) (quoting *Ristaino v. Ross*, 424 U.S. 589, 595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976)).

[2] Martinez-Salazar's initial brief contains a claim that the district court's refusal to strike juror Gilbert for cause "force[d] [him] to use one of his preemptory [sic] strikes to remove Gilbert from the panel," but does not explicitly allege a Fifth Amendment violation.

"When a juror has stated that she can decide a case impartially," a district court does not abuse its discretion in not excusing him for cause. *United States v. Poschwatta*, 829 F.2d 1477, 1484 (9th Cir. 1987), *overruling on other grounds recognized by United States v. Powell*, 936 F.2d 1056, 1064 n. 3 (9th Cir. 1991). We have upheld a district court's decision not to dismiss for cause a juror who initially admits bias as long as he or she ultimately asserts an ability to be fair and impartial. *See, e.g., United States v. Alexander*, 48 F.3d 1477, 1484 (9th Cir. 1995) (juror initially said he "believed" he could be impartial but ultimately stated definitively that he could act fairly); *Poschwatta*, 829 F.2d at 1484 (juror claimed impartiality despite strong feelings about excuses for failing to file tax returns); *United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir. 1983) (juror initially said he would "try" to be impartial but ultimately stated, "Okay, I will do it").

The district court here should have excused juror Gilbert for cause because he did not and would not affirmatively state that he could lay aside his admitted bias in favor of the prosecution. Juror Gilbert clearly acknowledged this bias, even after being instructed by the district court that it was "contrary to our whole system of justice." He never retreated from his statement of bias; he only cryptically stated that he understood the presumption of innocence "in theory." The government's contrary assertions about juror Gilbert's statements are unsupported by the record.

2. Sixth Amendment

Initially, Martinez-Salazar claimed that the district court's refusal to excuse juror Gilbert constituted a Sixth Amendment violation. *Ross* forecloses this argument, however, holding that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." 487 U.S. at 88. Under *Ross*, because Martinez-Salazar's counsel eventually struck juror Gilbert with a peremptory challenge, he suffered no prejudice to his Sixth Amendment right to trial by an impartial jury. *See also Siripongs v. Calderon*, 35 F.3d 1308, 1322 (9th Cir. 1994); *Baker*, 10 F.3d at 1404.

3. Fifth Amendment

Martinez-Salazar's appellate counsel alleges that the district court's erroneous refusal to strike juror Gilbert for cause violated his Fifth Amendment right to due process by denying or impairing his right to the full complement of peremptory challenges to which federal law entitled him.[3] The relevant case law compels a decision in his favor.

a. The Violation

Over thirty years ago, the Supreme Court held that a denial or impairment of the right to exercise peremp-

---

[3] In its supplemental brief and at oral argument, the government conceded that due process would be violated if Martinez-Salazar had to use a peremptory challenge to strike a juror who should have been stricken for cause. The government's position was that the district court had not erred in refusing to strike juror Gilbert for cause. We disagree, however, and independently conclude that the district court's decision violated Martinez-Salazar's Fifth Amendment right to due process.

tory challenges "is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled in part by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When considering whether the loss of a peremptory challenge violates due process, *Ross* limits what constitutes a denial or impairment of the right of peremptory challenge.[4] *Ross* explained:

> Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

487 U.S. at 89, 108 S. Ct. 2273 (citations omitted). The Oklahoma law at issue in *Ross* entitled the defendant to nine peremptory challenges. Under that law, one of the required uses of a peremptory challenge was to "cure erroneous refusals by the trial court to excuse jurors for cause." *Id.* at 90, 108 S. Ct. 2273. Accordingly, the defendant in *Ross* did not lose any right conferred by state law when he expended one of the nine challenges to remove a juror that should have been excused for cause. *See id.* at 90-91, 108 S. Ct. 2273.

Ross, however, left open the possibility that a Fifth Amendment due process challenge could succeed if the

---

[4] Because *Ross* involved an appeal of a state-court decision, the Court framed the issue as arising under the Due Process Clause of the Fourteenth Amendment. Martinez-Salazar's claim arises in federal court and hence is rooted in the Due Process Clause of the Fifth Amendment.

applicable law granting a defendant the right to exercise peremptory challenges did not require their use to cure erroneous refusals to remove jurors for cause. Specifically, the Court stated: "We need not decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." *Id.* at 91 n.4, 108 S. Ct. 2273.

We have twice revisited *Ross* but not answered this specific question. In Baker, we interpreted *Ross* to mean that "the due process 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive the full complement of challenges to which he is entitled by law." 10 F.3d at 1404. Because the defendants-appellants in *Baker* based their Fifth Amendment due process challenge on the district court's refusal to ask prospective jurors proposed supplemental questions, however, that case did not address the question of whether a federal defendant is denied the "full complement" when he is forced to use one of his peremptory challenges to cure an erroneous for-cause refusal. Moreover, we held that no due process violation occurred because the defendants were granted more challenges than they were entitled to under federal law. In addition, the opinion does not indicate whether the defendants used all allotted challenges. *See id.*

In *Siripongs*, we examined a defendant's claim that the trial court applied the wrong standard on voir dire to determine which venire members should be stricken for cause based on their views of the death penalty. We concluded that the defendant "failed to demonstrate

that any of the jurors actually empaneled were unduly prone to impose the penalty of death." 35 F.3d at 1322. We further stated:

> It is immaterial that [defendant] may have been required to use preemptory [sic] challenges to excuse jurors that the trial court would have excused for cause had it employed the proper standard. [Defendant] did not exhaust all of his preemptory [sic] challenges. Moreover, the loss of preemptory [sic] challenges is not a due process violation.

35 F.3d at 1322 (citing *Ross*, 487 U.S. at 88, 108 S. Ct. 2273).

We decline to apply literally and in all circumstances the statement that "the loss of [peremptory] challenges is not a due process violation." When, as in *Siripongs* and *Ross*, a state statute is involved, the answer may turn on the specific provisions of the statute. Like *Baker*, *Siripongs* did not reach the question whether due process is violated when a defendant is forced to exercise a peremptory challenge to cure an erroneous for-cause refusal. We think the above statement is best understood in the specific factual context of the case. The defendant in *Siripongs* could suffer no due process violation because he did not exhaust all of his peremptory challenges and hence this right was not "denied or impaired" in any way. Moreover, Siripongs alleged error under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), both Sixth Amendment cases. *Siripongs*, therefore, also does not answer the question left open by *Ross*.

More importantly, *Siripongs* cannot stand for the proposition that the loss of a peremptory challenge *never* violates due process because *Ross* and *Baker* make clear that some such losses do indeed violate due process. For example, due process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law. Hence *Siripongs* holds only that the loss of a peremptory challenge *does not necessarily* violate due process.[5]

Martinez-Salazar's case presents precisely the question *Ross* left open. Martinez-Salazar was entitled to and received eleven peremptory challenges, and federal law does not require a defendant to exercise a peremptory in order to cure an erroneous refusal to strike a juror for cause.[6] Furthermore, Martinez-Salazar and his codefendant exhausted his eleven peremptories and had to use one of them to strike juror Gilbert.

Under these circumstances, we hold that Martinez-Salazar's Fifth Amendment due process rights were violated. Martinez-Salazar was entitled to use his peremptory challenges solely to strike those jurors who would not otherwise be excused for cause. The district court erroneously denied his for-cause challenge to

---

[5] *Siripongs* and *Baker* are also panel decisions that pre-date the en banc decision in *Annigoni*. Although we attempt to harmonize them here, to the extent that either or both conflict with *Annigoni*, *Annigoni* must control. *See Campbell v. Wood*, 18 F.3d 662, 672 n. 2 (9th Cir. 1994) (en banc).

[6] A federal defendant can contest a decision to deny a for-cause challenge without first peremptorily striking the juror in question. *See United States v. Mobley*, 656 F.2d 988, 989-90 (5th Cir. Unit B Sept. 1981).

juror Gilbert, thereby forcing him to exercise one of his peremptories to achieve the same result.[7]

b. The Remedy

In *Annigoni*, we held that the erroneous denial of a defendant's right of peremptory challenge requires automatic reversal. *See* 96 F.3d at 1146-47. In that case, a trial court denied the defendant's peremptory challenge to a juror because it believed the challenge was racially motivated. We ultimately held: (1) the denial was erroneous because the defense offered a plausible explanation for the proposed peremptory challenge; and (2) the erroneous denial of a peremptory challenge is not subject to harmless-error analysis but requires reversal. *See id.*

While there is a difference between these facts and those in *Annigoni*—namely, the "offensive" juror did not serve on Martinez-Salazar's jury—the rationale applies equally here. Both involve the erroneous limitation of an essential right of a criminal defendant—the right to exercise non-discriminatory peremptory challenges without judicial interference. Prospective Juror Gilbert, remarkable if for nothing else but his candor, had no business sitting on this or any other criminal

[7] We find no merit in the government's argument that Martinez-Salazar cannot claim *his* due process rights were violated because it is unclear which defendant actually exercised the peremptory to strike juror Gilbert. Rule 24(b) entitles defendants *jointly* to ten peremptory challenges. The government's position taken to its logical extreme would lead to inequitable results. For example, if three defendants were tried together and all three agreed to strike juror A, but defendant # 1 actually exercised the peremptory challenge, only he could secure a reversal of his conviction if an error requiring automatic reversal occurred during the jury selection process.

jury. Peremptory challenges are reserved for government and defense counsel alike to use as they see fit, as long as *Batson* and its progeny are observed. Therefore, following *Annigoni*, we hold that the district court's effective denial of Martinez-Salazar's right to his full complement of peremptory challenges requires reversal of his conviction.

REVERSED AND REMANDED.

RYMER, Circuit Judge, concurring in part and dissenting in part:

In creating a Fifth Amendment due process right that is abridged whenever a defendant uses a peremptory challenge to strike a juror who should have been excused for cause, the majority constitutionalizes a statutory problem, approaches the problem as if error had been preserved (which it wasn't), and accomplishes through the back door what *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988), forecloses through the front. I therefore dissent.

In *Ross*, the Supreme Court held that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88, 108 S. Ct. 2273. Apart from the Sixth Amendment's guarantee of an impartial jury, there is no constitutional right to a peremptory challenge. *Id.* Because peremptory challenges are a creature of statute, the majority should not have gone beyond the Sixth Amendment in search of a constitutional basis for reversal.

Instead, this should be treated as an ordinary statutory question that could and should be resolved by ordinary statutory analysis. We have this case on

direct review of a federal criminal proceeding. We should, therefore, start with Rule 24(b) of the Federal Rules of Criminal Procedure, which is the source of the statutory entitlement to peremptories, and end with Rule 52, for "it is that Rule which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718 (1997).

Rule 24(b) gives defendants jointly ten peremptory challenges (unless the court allows more, which it may do if asked). Martinez in fact got to exercise all of his peremptory challenges; he never objected that the district court denied him "the full complement of peremptory challenges to which he [was] entitled." *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993). Nor did he ask for an extra peremptory to compensate for the one that he decided to use on Gilbert, or object to using a peremptory for this purpose. Nothing suggests that he would have used *that* peremptory on anyone else. In short, we are left with no idea whether Martinez "wasted" a peremptory, let alone wanted to strike another venireman who was not to his liking (for a legitimate reason) but couldn't do so because he was out of challenges. What we do know is that Martinez let the jurors be sworn without questioning either their impartiality or the process by which they were impaneled.

Having failed to tell the district court that its procedures were contrary to Rule 24(b), or that his due process rights were adversely affected, Martinez forfeited any claim that he was deprived of the ten challenges he was jointly allowed under Rule 24(b). It is

well settled that failure to raise an issue in the district court waives the argument. Counsel are quite used to making a record during jury selection, and courts have ample discretion to respond.

Our review is therefore constrained by Rule 52(b), which we must apply as outlined in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).[1] *See Johnson*, 117 S. Ct. at 1548. *Olano* requires that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Id.* at 1548-49 (citing *Olano*, 507 U.S. at 732, 113 S. Ct. 1770) (internal quotation marks omitted; alteration in *Johnson*).

Assuming that the district court erred in denying Martinez's challenge of Gilbert for cause,[2] it could not have been "plain" error to let Martinez use a peremptory to excuse the juror whom he had challenged for cause. This is so for at least three reasons. First, under *Ross*, using a peremptory to cure the trial court's improper failure to grant a challenge for cause does not violate a constitutional right without a showing of prejudice. Here, there is no dispute that the jury which was impaneled was impartial. Second, as the majority recognizes, we have never answered the specific question that it resolves today—whether there is a Fifth Amendment due process violation if the applicable law does not require use of a peremptory challenge to cure

---

[1] The majority approaches the appeal as if Martinez preserved a Rule 24 error for review. He didn't, and the majority's analysis goes astray for this reason as well.

[2] I assume error in this respect because the majority finds there was error.

an erroneous refusal to remove for cause. So far as I know, no one else has, either. Thus, the law definitely was not clear at the time of trial, or now. Finally, nothing in *Ross* or Rule 24(b) itself suggests that the exercise of peremptories is "denied" if the defendant uses a challenge to strike a juror who should been excused for cause. Indeed, we distinguished *Ross* on precisely this footing in *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc), indicating that "the [trial] court's erroneous denial of Ross's challenge for cause prompted Ross to expend one of his peremptory challenges to remove the questionable juror [but] it *never deprived him* of the right of peremptory challenge." *Id.* at 1146 (emphasis in original). As the statutory violation was waived, we don't have to decide whether Martinez's statutory right to ten jointly exercised challenges was "impaired," nor do we have to decide whether automatic reversal remains the remedy for statutory error. *See Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *cf. Annigoni*, 96 F.3d at 1147 (rejecting harmless-error analysis for the erroneous denial of a peremptory challenge). Since no plain error appears, that's the end of this case so far as I am concerned.

Martinez's failure to preserve and pursue the available avenue of relief for violation of his statutory rights gives this court no license to make the Due Process Clause a default analysis. The Supreme Court has said over and over that "peremptory challenges are not of constitutional dimension." *Ross*, 487 U.S. at 88, 108 S. Ct. 2273 (citing *Gray v. Mississippi*, 481 U.S. 648, 663, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987)); *see Swain*, 380

U.S. at 219, 85 S. Ct. 824; *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 63 L. Ed. 1154 (1919); *see also* (after *Ross*) *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). Rather, "[t]hey are a means to achieve the end of an impartial jury." *Ross*, 487 U.S. at 88, 108 S. Ct. 2273. That end was indisputably achieved in this case. To find a due process violation for "effectively" denying or impairing Martinez's "right to the full complement of peremptory challenges to which he was entitled under federal law," as the majority does, maj. op. at 659, comes full circle by "effectively" making the exercise of a peremptory challenge a *constitutional* right—and a right, at that, whose dilution requires automatic reversal.

Constitutionalizing the impairment of peremptory challenges is not inconsequential. Trial courts, state and federal, rule on cause challenges by the minute. A statutory violation (state or federal) may well require reversal if the defendant has exhausted his peremptories by striking a juror he unsuccessfully challenged for cause; but there is no reason why the door should be open to review of state or federal *statutory* violations for *constitutional* error that can never be treated as harmless.

I would not have reached the issue the majority decides. I would not convert a violation of Rule 24(b) (assuming there was one) into a constitutional violation, and I would not engraft a common law remedy of per se reversal for a Rule violation (assuming it survives *Ross*) onto the Due Process Clause of the Fifth Amendment. I therefore dissent from Part II.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10158

D.C. No. CR-93-00284-EHC
(DISTRICT OF ARIZONA)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTONIO MARTINEZ-SALAZAR,
DEFENDANT-APPELLANT

[Filed: Oct. 7, 1998]

ORDER

Before: REINHARDT, RYMER and HAWKINS, Circuit Judges.

A majority of the panel voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition and to accept the en banc suggestion.

The full court was advised of the suggestion for rehearing en banc. An active Judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

NO. 98-1255

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

ABEL MARTINEZ-SALAZAR

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

MICHAEL D. GORDON
Counsel of Record
Assistant Federal Public Defender
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004
(602) 379-3561 or 1-800-758-7053

3

23 pp

QUESTION PRESENTED FOR REVIEW

I.

Did the district court's concededly erroneous denial of a for-cause challenge to a juror on voir dire, requiring the defendant to exercise a peremptory challenge to remove a biased juror, require reversal where the defendant subsequently exhausted all peremptory challenges and there was unequivocal evidence in the record that the defendant would have used the peremptory challenge on a different juror?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

NO. 98-1255

IN THE

SUPREME COURT OF THE UNITED STATES

ABEL MARTINEZ-SALAZAR,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari

To The United States Court of Appeals

for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at United States v. Martinez-Salazar146 F.3d 653 (9th Cir. 1998).

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998. Pet. App. 20a-21a. Justice O'Connor extended the time within which to file a petition for certiorari to and including February 4, 1999. The petition for a writ of certiorari was filed on February 4, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

A. Preliminary Statement.

The Government's Petition raises the issue of whether Mr. Martinez-Salazar ("Respondent") should have to demonstrate that he would have exercised a peremptory strike that the district court had erroneously denied him, on another juror. Couched in terms of "prejudice" or "harmless error," the Government's Petition ignores the record which plainly demonstrates that Respondent would have exercised his peremptory strike on another juror, had he not been forced to cure the district court's error. This case does not even raise the issue upon which the Government seeks this Court's review.

///

///

Moreover, the Government raised the argument for the first time in its Petition for Rehearing and Suggestion for Rehearing En Banc before the Court of Appeals. Therefore, the issue has been waived.

In any event, the decision in this case is consistent with this Court's previous holding regarding the erroneous denial of peremptory challenges in criminal trials. Ross v. Oklahoma, 487 U.S. 81, n.4 (1985). In Ross, this Court indicated that a deprivation of peremptory challenges raises the specter of *two* distinct constitutional violations, one involving the sixth-amendment right to a fair and impartial jury and the second involving the fifth-amendment right to procedural due process. Ross, 487 U.S. at n.4. While the Government continues to confuse the important distinction made in Ross, the Ninth Circuit Court of Appeals and all other Circuits have understood it and rationally applied this very important distinction in federal criminal cases.

The federal court precedent, post Ross, holds that the erroneous deprivation of a peremptory challenge, in a federal criminal trial, constitutes a due-process violation, where the defendant exhausts all challenges and uses one to cure the district court's error.[1] The Government's assertions to the contrary reflect, at best, a fundamental misunderstanding of the applicable precedent. Accordingly, the Government's Petition should be denied.

///

///

---

[1] As set forth below, Respondent's case presented the Court of Appeals with different circumstances, because he demonstrated prejudice to the Court of Appeals by providing unequivocal evidence that he would have exercised the erroneously denied peremptory on another juror. See § B of this Response, infra. The Government's statement of the issue violates this Court's rule requiring it to express the issue "in relation to the circumstances of the case." Rules of the Supreme Court of the United States, R. 14(1)(a) (1998).

B. **Background**.

At the voir dire preceding during Respondent's jury trial, prospective juror Gilbert stated in response to a written question from the court asking whether jurors knew anything that might affect their ability to serve impartially, that "I would favor the prosecution." (Pet. App. 3a). When questioned by the court about this answer, he repeated that "what I'm saying is all things being equal, I would probably tend to favor the prosecution." (Pet. App. 4a). The court then asked whether, "if you were the defendants here charged with this crime, and all of the jurors on your case had your background and opinions, do you think you'd get a fair trial?" Gilbert responded: "[t]hat's a difficult question. I don't think I know the answer to that." Id. Respondent's counsel then questioned Gilbert, asking "If you were to error [sic], where would you feel more comfortable erring, in favor of the prosecution or defendant?" Gilbert responded, "I would probably be more favorable to the prosecution. . . . You assume that people are on trial because they did something wrong." (Pet. App. 5a). When the court mentioned the presumption of innocence, Gilbert answered that he understood that "in theory." Id.

Respondent challenged Gilbert for cause. The Government opposed the challenge, inaccurately stating that "although he [Gilbert] did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." (Pet. App. 5a).

Although recognizing that Respondent had "reasons to challenge" Gilbert, the district court denied Respondent's challenge for cause, advising Respondent that he could use a peremptory challenge to strike Juror Gilbert, "if you choose to do that." (Pet. App. 6a). Respondent used a peremptory challenge to strike juror Gilbert, and subsequently exhausted all of his allotted peremptories.

Shortly thereafter, as the petit jury was being called from the jury panel, the parties discovered a potential juror was missing. Id. at 124. Respondent's counsel then twice asked the district court to award an additional peremptory challenge, noting that the additional challenge would allow the parties to go further down the jury list, resulting in more minorities on the panel. (R.T. 12/7/93, pp. 124-25). The district court refused the requests. Id.[2]

In the Court of Appeals, the Government conceded that due process would be violated if Respondent had to use a peremptory challenge to strike a juror who should have been stricken for cause, arguing instead that "the district court had not erred in refusing to strike juror Gilbert for cause." (Pet. App. 9a n.3). The Court of Appeals rejected this argument. The court observed that juror Gilbert "did not and would not affirmatively state that he could lay aside his admitted bias in favor of the prosecution," but rather had "clearly acknowledged this bias." (Pet. App. 8a). The Court of Appeals generously characterized the Government's contrary assertions as being "unsupported by the record." Id. Thus, the district court should have excused juror Gilbert for cause "because of his admitted bias in favor of the prosecution." (Pet. App. 7a).

The Court of Appeals then held, in the circumstances of this case, that Respondent's due process rights had been violated. Respondent "was entitled to use his peremptory challenges

---

[2] At the Court of Appeals, the Government affirmatively conceded that if defendant did exhaust all peremptory challenges, including one to cure a trial court error, there was a due process violation. Appellee's Supplemental Brief, p. 12 (6/1/95). The Government first raised the argument (now raised here) that Respondent must show that he would have used the erroneously denied peremptory challenge, on another juror, in its petition for rehearing at the Court of Appeals. The Government acknowledges that, in response to that rehearing petition, Respondent demonstrated that "the trial record indicated that Respondent would have exercised an additional peremptory challenge if one had been available." (Pet. 12 n.6.). The Court of Appeals had this evidence before it when it denied the Government's Petition for Rehearing with the Suggestion for Rehearing En Banc.

solely to strike those jurors who would not otherwise be excused for cause." The district court, however, had erroneously denied Respondent's for-cause challenge to Gilbert, "thereby forcing [Respondent] to exercise one of his peremptories to achieve the same result." Since Respondent ultimately exhausted all of his peremptories, the district court's serious procedural error deprived Respondent of the "full complement" of peremptory challenge he was entitled to exercise under federal law. (Pet. App. 11a-14a).[3]

In reaching this conclusion, the Court of Appeals expressly distinguished prior circuit cases in which the defendant "could suffer not due process violation because he did not exhaust all of his peremptory challenges and hence this right was not 'denied or impaired' in any way." See Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1993). The due process violation occurs "only if the defendant does not receive the full complement of challenges, to which he is entitled by law." In this case, Respondent had "exhausted his eleven peremptories and had to use one of them to strike juror Gilbert" in order to cure "an erroneous for-cause refusal." (Pet. App. 11a-12a). This "erroneous limitation of an essential right of a criminal defendant – the right to exercise non-discriminatory peremptory challenges without judicial interference" required reversal of Respondent's conviction. (Pet. App. 14a-15a). Judge Ryner concurred in part and dissented in part.

The Court of Appeals further found that the error forced Respondent to exercise a peremptory challenge, violating procedural-due process. Martinez-Salazar, 146 F.3d at 656-58. The Court of Appeals expressly noted that Respondent had otherwise exhausted all peremptory

///

[3] The court noted that, unlike the law in some jurisdictions, "federal law does not require a defendant to exercise a peremptory in order to cure an erroneous refusal to strike a juror for cause." (Pet. App. 13a and n.6).

challenges. Id. Applying the Ninth Circuit's En Banc decision in United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996), the Court of Appeals reversed. Maratinez-Salazar, 146 F.3d at 659.

On July 13, 1998, the Government petitioned the Ninth Circuit for rehearing and suggested rehearing En Banc. Despite its earlier concession, the Government now argued that there was no due-process violation, even if the district court erred when it denied Respondent's for-cause challenge. Government's Petition for Rehearing With Suggestion for Rehearing En Banc, pp. 9-10. In support of its new argument, the Government raised yet a new issue, --- namely, that there was no due-process violation, absent a showing that Respondent would have exercised his erroneously denied peremptory challenge, had the district court not erred. Id., at pp. 10-11.

The Court of Appeals ordered Respondent to file what would otherwise have been an optional responding brief. Fed. R. App. P. 35. In that brief, Respondent provided transcript testimony demonstrating that he would have exercised the erroneously denied peremptory strike on another juror. (Pet. 12 n..6); Respondent's Response to Government's Petition for Rehearing with Suggestion for Rehearing En Banc, Appendix A. On October 7, 1998, the Court of Appeals denied the petition for rehearing.

ARGUMENT

The Government challenges the Court of Appeals' Opinion and argues that the Ninth Circuit held that Respondent's procedural due-process rights were denied when the district court erroneously denied a for-cause challenge, forcing the Respondent to exercise a peremptory challenge to cure the trial court's error, where the Defendant had exhausted all other challenges. The Government argues that, absent a showing of prejudice, there cannot be a due-process violation. The

///

Government's argument is contrary to the position taken by all the Circuits that have addressed the issue. There is no square conflict.

The Government also dismisses or omits key procedural facts, presented by Respondent to the Court of Appeals, that demonstrate the error was not harmless. The issue raised by the Government, therefore, is not before this Court.

A. Petitioner's Issue is Not Directly Raised by This Case.

Rules of this Court require Respondent to point out any "misstatement made in the Petition" and "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . .." See Rules of the Supreme Court of the United States, R. 15(2) (1998). For the following reasons Respondent hereby objects.

1. The Government Ignores the Procedural Posture.

The issue upon which the Government seeks review is simply not before this Court. The Government claims that Respondent "never suggested that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Juror Gilbert." Petition, ¶ 2, p. 5; pp. 11-12.[4] The claim ignores the factual and procedural realities of the case before the Court of Appeals.

Notably, the Government raised this argument for the first time its Petition for Rehearing and Suggestion for Rehearing En Banc filed before the Court of Appeals. The Government raised the issue *after* that Court of Appeals first ruled on the matter. The argument

[4] The Government later acknowledges such evidence was provided to the Court of Appeals but such evidence is to "case specific" and irrelevant. (Pet. 12, n.6). The evidence was relevant precisely because it was case specific. The Court of Appeals ordered a response to the Petition denied it only after it received this evidence.

boldly ignored its earlier concessions at the Court of Appeals and merely parroted Judge Rymer's dissent. Id; Martinez-Salazar, 146 F.3d at 659-61.

Importantly, after the Government raised the issue, the Court of Appeals ordered Respondent to file what would have otherwise been an optional Responding Brief. See Fed. R. App. P. 35(b) (1998). There, the Respondent unequivocally demonstrated that the record in fact reflected that he would have exercised his erroneously denied peremptory challenge on another juror. Indeed, Respondent's counsel twice asked for peremptory challenges when the opportunity presented itself.

It was against this procedural backdrop that the Court of Appeals subsequently denied the Government's Petition for Rehearing and Suggestion for Rehearing En Banc. Surprisingly, the Government's Petition before this Court again ignores these controlling factors and, in fact, dismisses them as "irrelevant." As noted earlier, the Government's position on this point is specious. See note 2, supra

Ultimately, therefore, the Petition misstates the issue as it now stands before this Court. When framed accurately, the issue left before the Court of Appeals, and now this Court, is whether procedural due process is violated when the district court erroneously denies a for-cause challenge forcing the defendant to use a peremptory challenge to cure the error, exhausting all peremptory challenges in the process--- and where there is unequivocal evidence in the record demonstrating that he would have used the erroneously denied peremptory challenge on a different juror.

The Government must await for another case, if it wishes review of the procedurally different issue presented in its Petition.

///

2. The Government Waived the Issue.

Even if the issue raised in the Petition were properly framed, the Government waived it by not raising it in a timely manner before the Court of Appeals. See, e.g., Singleton v. Wulff, 428 U.S. 106 (1976); cf. Miller v. Fairchild Indus., Inc., 797 F.2d 727, 737 (9th Cir. 1985) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in the appellant's opening brief.") (citations omitted). In fact, the Government failed to raise the issue of whether Respondent must demonstrate prejudice for a fifth-amendment violation until it lost the case. If there were any question on the Government's intent to omit the issue, it became clear in the Supplemental Brief and at oral argument when it conceded that if the district court erred, there was a due process violation. Appellee's Supplemental Brief, p. 12; Martinez-Salazar, 146 F.3d at n. 3.

That the Court of Appeals may have "independently" found a due-process violation is of no consequence. While the Government belatedly attempted to retract its earlier concessions, the retraction does not alter the fact that it had already waived the argument by not raising it in the briefs. In short, the Government provides no authority supporting the proposition that it may adopt a new argument, mimicking a dissent, after waiving the issue before the Court of Appeals and after conceding the issue at oral argument.

B. There is No Other Basis for the Petition.

1. Erroneous Denial of a Peremptory Challenge Requires Reversal If it Violates Either the Fifth or the Sixth Amendment.

The Court of Appeals' decision correctly applied this Court's ruling in Ross v. Oklahoma, 487 U.S. 81 (1985) and its own decision in United States v. Annigoni, 96 F.3d 1132 (9th

Cir. 1996). In Ross, this Court addressed a two-prong attack on the Oklahoma state court's erroneous failure to exclude an unqualified juror for cause, forcing the defendant to exercise a peremptory challenge to cure the error. The Court in Ross rejected a sixth-amendment because the unqualified juror had been struck and therefore, the defendant's sixth-amendment right to a fair and impartial jury had not been transgressed. Ross, 487 U.S. at 85-91. The Court also rejected the procedural-due-process challenge because Oklahoma state law required that the defendant cure such errors. Procedurally speaking, Mr. Ross received all that was due him under the law and there was no procedural violation. Id.

This Court in Ross held that violation of the sixth amendment required a showing of a partial or tainted jury,---a violation of the very rights guaranteed by the sixth amendment. This Court expressly limited its holding to the sixth-amendment. Ross, 487 U.S. at n.4. This Court has not addressed the issue since.

The courts of appeals have subsequently addressed the fifth-amendment issue left open in Ross. These courts have uniformly held that, where, as here, the defendant uses a peremptory challenge to cure the district court's erroneous denial of a for-cause challenge and exhausts all other peremptory challenges, a due-process violation occurs and such error is not harmless. See, e.g., Annigoni, 96 F.3d at 1144-1145; United States v. Underwood, 122 F.3d 389, 392 (7th Cir. 1997) ("We join our sister circuits, post Ross, that harmless error is inappropriate where a defendant's peremptory challenge has been denied or impaired") (citing to the Second,

///

///

///

Third, Fifth and Ninth Circuits.). The First Circuit has come to the same conclusion. See United States v. Cambara, 902 F.2d 144, 147-48 (1st Cir. 1990).[5]

These courts analyses are persuasive. In Annigoni, for example, the district court erroneously granted the Government's Batson challenge,[6] thereby denying defendant a peremptory challenge. Annigoni, 96 F.3d 1144-45. Refusing to apply a harmless error analysis, the Annigoni court found that such error cannot be quantitatively assessed, correctly observing that "to apply a harmless error analysis would be to misapprehend the very nature of peremptory challenges." Id. The court further noted that the courts would have to engage in outright speculation. Id. The other circuits addressing the issue agree that harmless error analysis is entirely inappropriate. See, e.g., United States v. Broussard, 987 F.2d 215, 221 (5th Cir. 1993) (harmless error analysis "would eviscerate the right to exercise peremptory challenges because it would be virtually impossible to determine that [the denial], injurious to the perceived fairness of the petit jury [was] harmless."); accord Kirk v. Raymark, Industries, 61 F.3d 147, 157-59 (3d Cir. 1995), cert. denied, 16 U.S. 1145 (1996).

As noted by the Courts of Appeals, this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965) (and its progeny) leaves no doubt that substantial impairment of peremptory

---

[5] The question of whether due-process rights have been impaired in the first instance turns on whether the criminal defendant has "left over" peremptory challenges. Stated another way, the courts first determine whether the district court erroneously denied a for-cause challenge and then require the defendant to have exhausted all other challenges, including one on the constitutionally unacceptable juror. See, e.g., Siriprongs v. Calderon, 35 F.3d 1308, 1405 (9th Cir. 1993); United States v. Baker, 10 F.3d 1374 (9th Cir. 1993) ("the due process 'right' to peremptory challenges is 'denied' or 'impaired' only if the defendant does not receive the full complement of challenges to which he is entitled to under law.").

[6] Batson v. Kentucky, 476 U.S. 79 (1986).

challenges rises to the level of a due-process violation. See, e.g., Annigoni, 96 F.3d at 1143-46; Underwood, 122 F.3d at 391. In Swain, this Court addressed a defendant's attack of an all-white jury on the ground that he had been denied equal protection under a racially discriminatory selection process, including the misuse of peremptory strikes. Notwithstanding the statutory nature of peremptory challenges, this Court observed:

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenges is a necessary part of a trial by jury. []. [T]here is nothing in the Constitution of the United States which requires the Congress grant peremptory challenges []. Nonetheless the challenges are 'one of the most important of the rights secured to the accused."[] The denial of impairment of the right is reversible error without a showing of prejudice. []. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."[]

Swain, U.S. at 218-19 (citations omitted).

The Courts of Appeals decision also observed that Ross did not retreat from the strong position taken in Swain. See, e.g., Annigoni, 96 F.3d at 1146. This Court merely acknowledged the principle that peremptory challenges are a procedural creature created by statute and that when the legislative authority limits its exercise, there is no procedural due process violation ---- because the defendant receives all the procedure that is statutorily due. Ross, 487 at n.4.

In Ross, this Court further noted that in state courts, state procedural law governs the application of peremptory challenges. Ross, 487 U.S. 89-91 (citing Ferril v. State, 475 P.2d 825 (Okla. Crim. App. 1970); McDonald v. State, 15 P.2d 1092 (Okla. 1932)). The use of peremptory challenges under Fed. R. Crim. P. Rule 24, on the other hand, is a matter of Federal law and does not require the defendant to cure trial court errors. See, e.g., United States v. Beasley, 489 F.3d 268,

n.5 (7th Cir. 1995); United States v. Boyd, 446 F.2d 1267, 1276, n. 27 (5th Cir. 1971).

There are no "square conflicts," as claimed in the Government's Petition. Indeed, the Government cites to no Circuit that has squarely held that denial of peremptory challenges requires a harmless-error analysis. In each case cited by the Government as being in conflict with the Ninth Circuit, the court addressed a *sixth-amendment* violation, found no error in striking the juror, or failed altogether to address whether a due-process violation occurred at all. See United States v. Gibson, 105 F.3d 1229, 1233 (8th Cir. 1997) (no discussion of due process); United States v. McIntyre, 997 F.2d 687, n. 7 (10th Cir. 1993) (court rejected claim that juror should have been struck and, in any event, ruled on sixth-amendment grounds only); Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119 (10th Cir. 1995) (court found no *seventh* amendment violation, analogizing only to Ross' sixth-amendment analysis only); United States v. Farmer, 923 F.3d 1557, 1566 & n.18 & 20 (11th Cir. 1991) (court expressly noted that the district court gave five more peremptory challenges than defendant was entitled to).

Similarly, there are no "internally inconsistent" circuits. Petition, p. 17, n. 9. The Government again cites cases where the courts failed to address any due-process claim or found that the district court did not error in striking the disputed juror in the first instance. See United States v. Rubin, 37 F.3d 49, 54 (2d Cir. 1994) (no error in striking juror and the court and never addressed whether it considered the "claim" a potential sixth or fifth-amendment violation); United States v. Love, 134 F.3d 595 (4th Cir.), cert. denied, 118 S. Ct. 2332 (1998) ("It cannot be said that the defendants 'wasted' their peremptory challenges" rejecting claims of confusion over process used by the district court) (distinguishing itself on those grounds from its En Banc decision in United States v. Ricks, 802 F.3d 731 (4th Cir. 1986)).

2. The Error was Not Harmless.

Despite the circuit courts' clear rejection of a harmless-error analysis, the Government now asks the Court to apply this analysis because the defendant purportedly never proffered evidence that he would have exercised the erroneously-denied challenge to another juror. Petition, pp. 11-12. Even if such harmlessness could be measured in these terms, the argument is both legally and factually incorrect.

The Government's argument is legally incorrect because it ignores the distinction between sixth and fifth-amendment violations. A sixth-amendment violation occurs only upon the transgression of rights to a fair and impartial jury. See Ross. A fifth-amendment, procedural due process violation occurs upon the substantial impairment of the procedural rights owed under law. See, e.g., Baker.

Here, Respondent's procedural rights included the right to exercise his peremptory challenges freely without judicial interference. Swain. The Government's argument that he should have asked for another strike is bewildering. Respondent had already moved to strike Juror Gilbert for cause, and the district court was on clear notice that the defendant found him constitutionally objectionable. Moreover, responding to the motion to strike Juror Gilbert for cause, the district court expressly suggested that the defense use a peremptory challenge to strike him. (R.T. 12/7/93, p. 103). To suggest that the defense should then ask for an additional peremptory strike is to require the asking for something that had been just expressly denied. The argument is nonsensical.

Moreover, there is direct evidence that Respondent would have exercised the erroneously denied strike on another juror. Indeed, his counsel expressed a desire for additional peremptory strikes. When the opportunity arose, he twice requested for an additional peremptory

strike. These requests for additional peremptory challenges, in conjunction with the exhaustion of all previous strikes, clearly indicate that Respondent would have exercised his erroneously denied peremptory strike on another juror.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted: March 18, 1999.

FREDRIC F. KAY
Federal Public Defender

Michael D. Gordon

MICHAEL D. GORDON
Assistant Federal Public Defender

CERTIFICATE OF MAILING - PROOF OF SERVICE

Michael D. Gordon, Assistant Federal Public Defender, District of Arizona, Phoenix, Arizona declares under penalty of perjury that the following is true and correct:

That in accordance with Rule 29(2)Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox this original Response to Petition For Writ Of Certiorari to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29(5), Supreme Court Rules, on 18th day of March 1999, one copy of this Response to Petition For Writ Of Certiorari has been mailed to the Honorable Seth Waxman, Solicitor General, U.S. Department of Justice, 10th Street and Constitution Ave., N.W., Room 5143, Washington D.C. 20530; one copy hand-delivered to Vincent Kirby, Assistant U.S. Attorney, 4000 United States Courthouse, Phoenix, Arizona, telephone number (602) 514-7500; and one copy mailed to, Respondent Abel Martinez-Salazar.

FREDRIC F. KAY
Federal Public Defender

Michael D. Gordon

MICHAEL D. GORDON
Assistant Federal Public Defender
Attorney for Respondent

(3)

No. 98-1255

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

98

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1255

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not dispute the importance and the recurring nature of the question we have presented: whether a criminal defendant who exhausts his peremptory challenges is entitled to automatic reversal of his conviction if he uses one of those challenges to remove a potential juror whom the district court erroneously failed to remove for cause. Rather, he contends, for four principal reasons, that the Court should not decide that question in this case. Respondent's contentions are without merit.

1. The decision below rests on two clearly expressed holdings: first, that the Due Process Clause was violated here, because respondent exhausted his allotment of peremptory challenges and had to use one of those

challenges to remove a potential juror whom the district court erroneously refused to remove for cause, Pet. App. 13a-14a; and, second, that the "effective denial of [respondent's] right to his full complement of peremptory challenges" "requires automatic reversal," *id.* at 15a, 14a. Respondent argues (Br. in Opp. 8-9), however, that this case does not properly present the issues that the court of appeals actually decided. Rather, respondent claims, the issue presented is a narrower one:

> whether procedural due process is violated when the district court erroneously denies a for-cause challenge forcing the defendant to use a peremptory challenge to cure the error, exhausting all peremptory challenges in the process—*and* where there is unequivocal evidence in the record demonstrating that he would have used the erroneously denied peremptory challenge on a different juror.

Id. at 9. That narrower issue, respondent further argues, does not merit this Court's review. *Id.* at 10-16.

Respondent is mistaken. Nowhere did the court of appeals suggest that its rule of automatic reversal is limited to cases in which the defendant not only exhausted his peremptory challenges but also objected in the trial court to the composition of the jury that was selected. To the contrary, the court of appeals required only that respondent have exhausted his complement of peremptory challenges. Pet. App. 13a. See also *Vansickel* v. *White*, 166 F.3d 953, 956 (9th Cir. 1999) (noting that *Martinez-Salazar* distinguished earlier cases because in those cases the defendant "did not exhaust all of his peremptory challenges and hence his right was not denied or impaired in any way") (internal quotation marks omitted). And by reversing respondent's convictions without addressing the dissent's contention (Pet. App. 16a) that respondent failed to object to the jury that was seated, the court implicitly confirmed that it did not view such an objection as a prerequisite to reversal.

Thus, the issue decided by the court of appeals, and presented by our petition, is whether a criminal defendant who exhausts his peremptory challenges is entitled to automatic reversal of his conviction if he uses one of those challenges to remove a potential juror whom the district court erroneously failed to remove for cause. If the petition is granted to address that issue, respondent can seek to defend the judgment below on the narrower ground that reversal is in any event required in such circumstances where the defendant also objects in the trial court to the composition of the seated jury. But respondent's presentation of that narrower argument does not undercut the need for this Court's review of the broader legal rule actually announced and applied by the court of appeals. That is particularly true because respondent's narrower argument for affirmance is both legally and factually flawed.[1]

---

[1] For the reasons stated in the petition (Pet. 8-16), respondent's convictions should be affirmed even if respondent had objected in the trial court to the composition of the seated jury. In any event, respondent made no such objection. Rather, after one of the selected jurors was found to be missing, respondent simply requested that the parties be given additional peremptory challenges to select a replacement juror. 12/7/93 Tr. 124-125. Respondent made that request, moreover, because he hoped that the exercise of additional challenges at that point would result in the seating of a Hispanic juror. *Id.* at 125. But see *Georgia* v. *McCollum*, 505 U.S. 42 (1992) (criminal defendant may not exercise peremptory challenges on the basis of race).

2. Respondent argues (Br. in Opp. 10) that the petition should be denied because the issue presented was not raised in a timely manner before the court of appeals. As we noted in the petition (Pet. 5 n.1), the government did concede in a supplemental brief to the court of appeals that it would violate due process to deprive a defendant of his full allotment of peremptory challenges by requiring him to use a peremptory challenge to remove a juror who should have been removed for cause. In its initial brief in the court of appeals, however, the government argued that respondent's convictions should not be reversed because respondent could not show prejudice meriting reversal. Gov't C.A. Br. 10-11. See also Pet. for Reh'g 6-12 (retracting due process concession and reiterating argument that respondent failed to show prejudice meriting reversal).

More importantly, although this Court normally does not review questions that were *neither* "pressed [n]or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992), the court of appeals squarely passed on the issues raised here: that respondent's due process rights were violated and that such violations require automatic reversal. See Pet. App. 9a n.3 ("independently conclud[ing]" that respondent's due process rights were violated), 14a-15a (adopting rule of automatic reversal without suggesting that the government failed to preserve that issue). Those holdings are therefore properly presented for this Court's review. See, *e.g.*, *Williams*, 504 U.S. at 40-45; *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. * * * It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is" unsettled and important.) (citations omitted).

3. Respondent contends (Br. in Opp. 14) that there is no square conflict among the courts of appeals, because "no Circuit * * * has squarely held that denial of peremptory challenges requires a harmless-error analysis." Respondent is incorrect. In *United States* v. *Brooks*, 161 F.3d 1240, 1245-1246 (1998), for example, the Tenth Circuit found harmless the precise error at issue here: the erroneous denial of a for-cause challenge, requiring a criminal defendant to use a peremptory challenge to remove the juror in question. See *ibid.* ("Even if the denial of the challenge for cause was error, [an issue the court did not decide,] it was harmless because [the juror in question] was removed by a peremptory challenge. * * * [T]he fact that [the defendant] could have used the peremptory he 'wasted' [to remove] other members of the venire is of no moment."). See also *Getter* v. *Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122-1123 (10th Cir. 1995) (same in civil case), cert. denied, 516 U.S. 1146 (1996). Respondent's convictions would certainly have been affirmed in the Tenth Circuit.[2]

---

[2] Respondent claims (Br. in Opp. 14) that the Tenth Circuit has "failed altogether to address whether a due-process violation" occurs in the circumstances of the present case. To the contrary, the Tenth Circuit expressly held in *Getter* that no due process violation had occurred. 66 F.3d at 1123. See also *Brooks*, 161 F.3d at 1245-1246 (relying on *Getter*). Respondent makes a similar claim about the law of the Second Circuit (Br. in Opp. 14), but he is again mistaken. See *United States* v. *Towne*, 870 F.2d 880, 885 (2d Cir.) (even if district court erred by refusing to excuse potential juror for cause and defendant therefore had to use peremptory challenge to excuse juror, defendant would not be entitled to reversal; "[s]ince [defendant] has in no way established the partiality of the jury that ultimately convicted him, he may not successfully claim deprivation of his sixth amendment or *due process* rights") (emphasis added), cert. denied, 490 U.S. 1101 (1989); *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994) (relying on *Towne*).

Respondent's attempt (Br. in Opp. 14) to distinguish the decisions of the Eighth and Eleventh Circuits also fails. Although those courts may not have mentioned due process, both have categorically held that reversal is not required simply because a defendant exhausts his peremptory challenges and uses one of his challenges to remove a potential juror who should have been excused for cause. See, *e.g.*, *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997) (even if trial court's denial of for-cause challenge required defendant to exercise peremptory challenge that would otherwise have been used to remove another potential juror, that "does not state a ground for reversal"), cert. denied, 522 U.S. 1053 (1998); *United States* v. *Gibson*, 105 F.3d 1229, 1233 (8th Cir. 1997); *United States* v. *Farmer*, 923 F.2d 1557, 1566 (11th Cir. 1991).[3] Respondent's convictions would certainly have been affirmed in those circuits as well.

4. Finally, respondent argues (Br. in Opp. 10-16) that review is unwarranted because the decision of the court of appeals is correct. Given the conflict among the courts of appeals on the important and recurring issue presented, however, review would be warranted even if the ruling below were correct. In any event, respondent's defense of the ruling below is unavailing.

Respondent does not dispute that the right of federal criminal defendants to exercise peremptory challenges

[3] Respondent notes (Br. in Opp. 14) that the district court in *Farmer* had granted extra peremptory challenges to the parties. The court of appeals in *Farmer* noted that fact only in passing, however, see 923 F.2d at 1566 n.18, and did not rely on it at all in holding more broadly that a defendant is not entitled to reversal on the ground that "the district court's failure to strike jurors for cause forced him to 'use up' peremptory strikes." *Id.* at 1566. The holding of *Farmer* thus squarely conflicts with the holding of the court of appeals below.

is created by federal rule, not the Constitution. See Pet. 8-9. Nor does respondent take issue with the principle that the violation of a non-constitutional rule of procedure offends the Due Process Clause only if the violation is so gravely prejudicial as to deny the defendant a fair trial. Pet. 9. It cannot reasonably be said that respondent was denied a fair trial by the error at issue here, which simply required him to use one of his peremptory challenges to remove a potential juror who should have been removed for cause. Pet. 9-12. The court of appeals thus erred in concluding that due process was violated in this case.[4]

The court of appeals also erred by applying a rule of automatic reversal. Pet. 13-16. In arguing in support of a rule of automatic reversal, respondent relies heavily on dicta from this Court's decision in *Swain* v. *Alabama*, 380 U.S. 202 (1965), and on lower-court opinions that in turn rely on that dicta. See Br. in Opp. 11-13, 15. The dicta in *Swain*, however, rests on earlier decisions of this Court that antedate both the enactment of the harmless-error statute and rules and this Court's modern decisions construing those provisions. Pet. 12-

[4] As the Ninth Circuit has since elaborated, its finding of a due process violation in the present case rests on the view that the right to peremptory challenges, although created by federal rule or state law, gives rise to a "liberty interest" protected by the Fifth and Fourteenth Amendments. *Vansickel*, 166 F.3d at 957. The broad view that such non-constitutional rules of criminal procedure create liberty interests the impairment of which necessarily violates the Due Process Clause is in substantial tension with this Court's repeated holdings that violations of state law provide no basis for relief under federal law. See, *e.g.*, *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)).

14. This Court should grant review in order to determine the validity of the lower courts' continuing reliance on that language in *Swain*.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 1999

(4)

No. 98-1255

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

MICHAEL D. GORDON
Assistant Federal Public Defender
222 North Central Avenue, Suite 810
Phoenix, Arizona 85004
(602) 379-3561 or 1-800-758-7053

Counsel of Record
for Respondent

PETITION FOR CERTIORARI FILED: FEBRUARY 4, 1999
CERTIORARI GRANTED: JUNE 21, 1999

205 pp

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX)

Docket No. 93-CR-284-ALL

UNITED STATES OF AMERICA

v.

ABEL MARTINEZ SALAZAR, TOMAS VELEZ-GILES,
CELSO ORGANISTA-DORANTES

DOCKET ENTRIES

DATE	DOCKET NUMBERS	DOCKET ENTRY
7/27/93	—	DEFENDANT Abel Martinez Salazar, Tomas Velez-Giles, Celso Organista-Dorantes arrested. [2:93-m -210] (ph) [Entry date 07/29/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
7/28/93	2	(FILED: 7/28/93) MINUTES: Judge: SMM Interpreter: VanDuzer and Velasco first appearance of Abel Martinez Salazar, Tomas Velez-Giles, Celso Organista-Dorantes; informed of rights, charges, etc.;, dft Abel Martinez Salazar, Tomas Velez-Giles, Celso Organista-Dorantes appears with counsel Bernardo Mario Garcia, Richard L Juarez, Gregory Anthony Bartolomei, Interpreter Spanish for all three defendants, preliminary exam set 8/3/93 at 10:00 detention hearing set 8/3/93 at 10:00 before Mag Judge Morton Sitver as to all three defendants and Dfts temp ordered detained pending hrg of detention [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/29/93]
7/28/93	3	CJA Form 23 financial affidavit by Celso Organista-Dorantes [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/29/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
7/28/93	4	CJA Form 23 financial affidavit by Abel Martinez Salazar [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/29/93]
7/28/93	5	CJA Form 23 financial affidavit by Tomas Velez-Giles [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/29/93]
7/28/93	1	COMPLAINT filed as to Abel Martinez Salazar, Tomas Velez-Giles, Celso Organista-Dorantes ; Case assigned to Mag Judge Michael Mignella Jr signed by USDC Judge McNamee [2:93-m -210] (ph) [Entry date 07/29/93]
7/28/93	6	CJA Form 20 copy 4 as to Abel Martinez Salazar appointing Bernardo Garcia ; ordered by Judge Stephen M. McNamee [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/30/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
7/28/93	7	CJA Form 20 copy 4 as to Tomas Velez-Giles appointing , Richard Juarez ; ordered by Judge Stephen M. McNamee [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/30/93]
7/28/93	8	CJA Form 20 copy 4 as to Celso Organista-Dorantes appointing Gregory Bartolomei ; ordered by Judge Stephen M. McNamee [2:93-m -210] (ph) [Entry date 07/29/93] [Edit date 07/30/93]
8/3/93	9	(FILED: 8/4/93) MINUTES: Interpreter Velasco/Van Duzer Judge: MS Abel Martinez Salazar pres with Bernardo Garcia; Velez-Giles present with Richard Juarez; Organista-Dorantes present with Richard Juarez; preliminary exam held, prob cause found as to all dfts. detention hearing held. All dfts detained as flight and danger. before Mag Judge Morton Sitver [2:93-m -210] (ce) [Entry date 08/04/93] [Edit date 08/04/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
8/24/93	10	INDICTMENT by USA attorney Vincent Quill Kirby. Counts filed against Abel Martinez Salazar (1) count(s) 1, 2, 3, Tomas Velez-Giles (2) count(s) 1, 2, 3, Celso Organista-Dorantes (3) count(s) 1, 2, 3 (cn) [Entry date 08/25/93] [Edit date 08/25/93]
8/25/93	11	NOTICE issued ; arraignment set for 10:45 9/1/93 for Abel Martinez Salazar before Mag Judge Michael Mignella Jr (cn) [Entry date 08/25/93]
8/25/93	12	NOTICE issued ; arraignment set for 10:45 9/1/93 for Tomas Velez-Giles before Mag Judge Michael Mignella Jr (cn) [Entry date 08/25/93]
8/25/93	13	NOTICE issued ; arraignment set for 10:45 9/1/93 for Celso Organista-Dorantes before Mag Judge Michael Mignella Jr (cn) [Entry date 08/25/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
8/26/93	14	(FILED: 08-26-93) MINUTES: Judge: MM. Arraignment hearing for dft Celso Organista-Durante is reset to 09-01-93 at 11:15 am before Mag Judge Mignella at request for defense counsel. (aj) [Entry date 08/27/93]
8/30/93	15	ORDER of detention pending trial by Mag Judge Morton Sitver as to Tomas Velez-Giles (re: detention order [15-1] (ls) [Entry date 08/30/93]
8/30/93	16	ORDER of detention pending trial by Mag Judge Morton Sitver as to Abel Martinez Salazar (re: detention order [16-1] (cn) [Entry date 08/31/93]
8/31/93	17	ORDER of detention pending trial by Mag Judge Morton Sitver as to Celso Organista-Dorantes (re: detention order [17-1] (cn) [Entry date 08/31/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
9/1/93	18	(FILED: 9/1/93) MINUTES: Judge: MM Interpreter: Louis Velasco dft Abel Martinez Salazar arraigned; not guilty plea entered; Attorney Bernardo Garcia present;, dft oral mtn to have 30 days for pretrial motions grted, pretrial motions due 10/1/93 trial set for 10/12/93 at 9:00 before Judge Earl H. Carroll (seal) [Entry date 09/01/93]
9/1/93	19	(FILED: 9/1/93) MINUTES: Judge: MM dft Tomas Velez-Giles arraigned; not guilty plea entered; Attorney Richard L Juarez present;, dft oral mtn to have 30 days for pretrial mtns, grted, pretrial motions due 10/1/93 trial set for 10/12/93 at 9:00 before Judge Earl H. Carroll (seal) [Entry date 09/01/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
9/1/93	20	(FILED: 9/1/93) MINUTES: Judge: MM dft Celso Organista-Dorantes arraigned; not guilty plea entered; Attorney Gregory Bartolomei present;, dft oral mtn to have 30 days for pretrial mtns is grted, pretrial motions due 10/1/93 trial set for 10/12/93 at 9:00 before Judge Earl H. Carroll (seal) [Entry date 09/01/93]
9/7/93	21	MOTION to seal application for appt of an investigator by Celso Organista-Dorantes [21-1] (cn) [Entry date 09/08/93]
9/7/93	23	MOTION to preserve Gvt agent's rough notes by Celso Organista-Dorantes [23-1] (cn) [Entry date 09/09/93]
9/20/93	26	MOTION to continue trial [26-1], for extension of time to file pretrial motions [26-2] by Celso Organista-Dorantes (cn) [Entry date 09/21/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
9/23/93	27	ORDER by Judge Earl H. Carroll granting motion to continue trial [26-1], granting motion for extension of time to file pretrial motions [26-2] pretrial motions extended to 10/12/93 for dft Organista-Dorantes; trial continued to 11/16/93 at 9:00 for all dfts before Judge Earl H. Carroll, excludable delay interest of justice started (cn) [Entry date 09/28/93]
9/29/93	28	MOTION to continue trial [28-1] by Celso Organista-Dorantes (cn) [Entry date 09/30/93]
10/12/93	29	MOTION in limine re: admissibility of declarations by co-conspirators and request for James hrg [29-1] by Celso Organista-Dorantes (cn) [Entry date 10/14/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
10/12/93	30	MOTION for discovery re: statements attributed to dft pursuant to Rule 801(d0(2)(E) and mtn for James hrg [30-1] by Celso Organista-Dorantes (cn) [Entry date 10/14/93]
10/12/93	31	MOTION to suppress statements [31-1] by Celso Organista-Dorantes (cn) [Entry date 10/14/93]
10/12/93	32	MOTION to sever dfts [32-1] by Celso Organista-Dorantes (cn) [Entry date 10/14/93]
10/13/93	33	NOTICE of hearing setting mtns to sever dfts [32-1], to suppress statements [31-1], for discovery re: statements attributed to dft pursuant to Rule 801(d0(2)(E) and mtn for James hrg [30-1] & in limine re: admissibility of declarations by co-conspirators and request for James hrg [29-1] for hearing set for 3:00 11/1/93 for Celso Organista-Dorantes before Judge Earl H. Carroll (cn) [Entry date 10/14/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/8/93	36	MOTION for acceleration of hearings on mtn for discovery of statements, mtn in limine, mtn to suppress statements and mtn to sever [36-1] by Celso Organista-Dorantes (cn) [Entry date 11/09/93]
11/9/93	—	ORAL MOTION to continue trial [0-0] by Tomas Velez-Giles (cn) [Entry date 11/15/93]
11/9/93	37	(FILED: 11/10/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: B Brittan Pretrial conference held; granting oral motion to continue trial [0-0] (cnsl to submit a written mtn & order finding excludable time); trial continued to 11/30/93 at 9:00. Setting motion to suppress statements [31-1] for hearing at 4:00 on 11/17/93 for Celso Organista-Dorantes before Judge Earl H. Carroll (cn) [Entry date 11/15/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/10/93	38	NOTICE of confession, admissions and statements purs. to Local Rule 86 as to Celso Organista-Dorantes (cn) [Entry date 11/15/93]
11/15/93	39	RESPONSE by pla USA to motion to suppress statements [31-1] by dft Organista-Dorantes (cn) [Entry date 11/18/93]
11/16/93	40	RESPONSE by pla USA to motion to sever dfts [32-1] by dft Organista-Dorantes (cn) [Entry date 11/18/93]
11/16/93	41	RESPONSE by pla USA to motion for discovery re: statements attributed to dft pursuant to Rule 801(d)(2)(E) and mtn for James hrg [30-1] (cn) [Entry date 11/18/93]
11/16/93	42	RESPONSE by pla USA to motion in limine re: admissibility of declarations by co-conspirators and request for James hrg [29-1] (cn) [Entry date 11/18/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/16/93	43	RESPONSE by pla USA to motion to preserve Gvt agent's rough notes by Celso Organista-Dorantes [23-1] (cn) [Entry date 11/18/93]
11/17/93	44	(FILED: 11/18/93) MINUTES: ; possible chg of plea hearing set for 9:00 11/23/93 for Tomas Velez-Giles before Judge Earl H. Carroll (cn) [Entry date 11/22/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/17/93	45	(FILED: 11/18/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: B Brittan granting motion for acceleration of hearings on mtns [36-1], taking under advisement on 11/17/93 the motion to sever dfts [32-1], taking under advisement on 11/17/93 the motion to preserve Gvt agent's rough notes by Celso Organista-Dorantes [23-1], denying motion for discovery re: statements attributed to dft pursuant to Rule 801(d0(2)(E) and mtn for James hrg [30-1], re motion to suppress statements [31-1] ; hearing reset for 10:00 11/18/93 for Celso Organista-Dorantes before Judge Earl H. Carroll excludable delay XE stopped (cn) [Entry date 11/22/93]
11/18/93	46	(FILED: 11/18/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: B Brittan Interpreter: Louis Velasco denying motion to suppress statements [31-1] (cn) [Entry date 11/22/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/18/93	47	ORDER by Judge Earl H. Carroll granting motion to continue trial [28-1] ; trial set for 9:00 11/30/93 for Abel Martinez Salazar, for Tomas Velez-Giles, for Celso Organista-Dorantes before Judge Earl H. Carroll, excludable delay interest of justice started (cn) [Entry date 11/22/93]
11/18/93	48	ORDER by Judge Earl H. Carroll denying motion to sever dfts [32-1] excludable delay XG stopped (cn) [Entry date 11/22/93]
11/18/93	49	ORDER by Judge Earl H. Carroll granting motion to preserve Gvt agent's rough notes by Celso Organista-Dorantes [23-1] excludable delay XG stopped (cn) [Entry date 11/22/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/18/93	50	ORDER by Judge Earl H. Carroll denying motion in limine re: admissibility of declarations by co-conspirators and request for James hrg [29-1] (cn) [Entry date 11/22/93]
11/19/93	51	JURY Voir Dire requested by Celso Organista-Dorantes (cn) [Entry date 11/22/93]
11/23/93	52	(FILED: 11-23-93) MINUTES: before Judge Carroll. Ct Rptr: Bridget Brittan. Interpreter: Louis Velasco. Possible chg of plea hearing held. Tomas Velez-Giles (2) count 1 enters a plea of guilty. Plea agreement lodged as to dft Velez-Giles. Pretrial motions & trial date vacated; Sentencing set for 1:00 2/9/94 for dft Velez-Giles before Judge Carroll. Counts 2 and 3 to be dismissed at sentencing. (aj) [Entry date 11/24/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
11/23/93	53	(FILED: 11/23/93) MINUTES: before Judge Carroll. Ct Rptr: Bridget Brittan. Status hearing held on trial setting of 11-30-93. Discussion held; court adjourns. (aj) [Entry date 11/24/93]
11/23/93	54	Requested JURY instructions by USA (aj) [Entry date 11/24/93]
11/23/93	55	Requested JURY voir dire questions by USA (aj) [Entry date 11/24/93]
11/24/93	56	JURY Voir Dire requested by Abel Martinez Salazar (cn) [Entry date 11/29/93]
11/26/93	57	PROPOSED FINAL JURY instructions by Celso Organista-Dorantes (cn) [Entry date 11/29/93]
12/6/93	—	ORAL MOTION for appointment of different counsel [0-0] by Abel Martinez Salazar (cn) [Entry date 12/07/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/6/93	58	(FILED: 12/6/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: Vickie Reger Interpreter: Louis Velasco; pretrial conference held, denying motion for appointment of different counsel [0-0] ; trial set for 9:00 12/7/93 for Abel Martinez Salazar, for Celso Organista-Dorantes before Judge Earl H. Carroll (cn) [Entry date 12/07/93]
12/7/93	—	ORAL MOTION re: Batson challenge [0-0] by Celso Organista-Dorantes (cn) [Entry date 12/08/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/7/93	59	(FILED: 12/8/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: Vickie Reger Interpreter: Louis Velasco & Lita Van Duzer granting motion re: Batson challenge [0-0] by dft Organista-Dorantes voir dire begins as to Abel Martinez Salazar, Celso Organista-Dorantes, jury impaneled Abel Martinez Salazar (1) count(s) 1, 2, 3, Celso Organista-Dorantes (3) count(s) 1, 2, 3, pretrial motions vacated trial begins before Judge Earl H. Carroll (cn) [Entry date 12/08/93]
12/9/93	60	ORDER by Judge Earl H. Carroll that counsel for dft Salazar be allowed to meet with his client after 10 pm on 12/9/93 and before 8 am on 12/10/93 (re: order [60-1] (cn) [Entry date 12/10/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/9/93	61	STIPULATION between Abel Martinez Salazar, Celso Organista-Dorantes, USA re: exhibit 3 and exhibit 5A (cn) [Entry date 12/10/93]
12/9/93	—	ORAL MOTION to strike juror #10 [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/9/93	—	ORAL MOTION for mistrial [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/9/93	—	ORAL MOTION that transcript for exhibit 11(b) be prepared with english subtitles [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/9/93	—	ORAL MOTION for outstanding Jenkes material to be turned over to dfns [0-0] by Celso Organista-Dorantes (cn) [Entry date 12/13/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/9/93	—	ORAL MOTION for production of any report for fingerprint on the gun [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/9/93	—	ORAL MOTION to amend witness list to add Sergio Rosales [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/9/93	—	ORAL MOTION for judgment of acquittal [0-0] by Celso Organista-Dorantes (cn) [Entry date 12/13/93]
12/9/93	62	MEMORANDUM in support of motion for judgment of acquittal [0-0] by dft Organista-Dorantes (cn) [Entry date 12/13/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/9/93	63	(FILED: 12/13/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: Vickie Reger Interpreter: Lita Van Duzer & Louis Velasco denying oral motion to strike juror #10 [0-0], denying oral motion for mistrial [0-0], granting oral motion that transcript for exhibit 11(b) be prepared with english subtitles [0-0],, granting oral motion for production of any report for fingerprint on the gun [0-0], granting oral motion to amend witness list to add Sergio Rosales [0-0], denying oral motion for judgment of acquittal [0-0] denying motion to sever dfts [32-1] (cn) [Entry date 12/13/93]
12/10/93	64	PROPOSED SUPPLEMENTAL JURY instructions by Celso Organista-Dorantes (cn) [Entry date 12/13/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/10/93	—	ORAL MOTION recess to interview interpreter Sergio Rosales [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/10/93	—	ORAL MOTION to reopen case & allow Anna Ugarte Barua to testify [0-0] by USA as to Abel Martinez Salazar, Celso Organista-Dorantes (cn) [Entry date 12/13/93]
12/10/93	—	ORAL MOTION re-urging previous mtns [0-0] by Abel Martinez Salazar, Celso Organista-Dorantes (cn) [Entry date 12/13/93]
12/10/93	—	ORAL MOTION for judgment of acquittal [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/10/93	—	ORAL MOTION renewing all previous mtns, including the mtn to sever and Rule 29 mtn for judgment of acquittal [0-0] by Celso Organista-Dorantes (cn) [Entry date 12/13/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/10/93	—	ORAL MOTION for mistrial [0-0] by Abel Martinez Salazar (cn) [Entry date 12/13/93]
12/10/93	65	(FILED: 12/13/93) MINUTES: before Judge Earl H. Carroll Ct Rptr: Vickie Reger Interpreter: Lita Van Duzer & Louis Velasco denying oral motion to recess to interview interpreter Sergio Rosales [0-0], granting oral motion by gvt to reopen case & allow Anna Ugarte Barua to testify [0-0], denying oral motion re-urging previous mtns [0-0], denying oral motion for judgment of acquittal [0-0], denying oral motion renewing all previous mtns, including the mtn to sever and Rule 29 mtn for judgment of acquittal [0-0] (cn) [Entry date 12/13/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/13/93	66	(FILED: 12-13-93) MINUTES: before Judge Carroll. Ct Rptr: Vickie Reger. Interpreter: Lita Van Duzer and Velasco. JURY TRIAL continues. Abel Martinez Salazar (1) counts 1, 2, 3 found guilty. Sentencing set for 1:30 3/7/94 for Abel Salazar before Judge Carroll. Acquittal of Celso Organista-Dorantes (3) count(s) 1-3. Jury finds dft dft Organista-Dorantes NOT GUILTY as to Counts 1-3. Defendant dismissed from case. (aj) [Entry date 12/14/93]
12/13/93	67	JURY verdict of not guilty as to Celso Organista-Dorantes (3) counts 1, 2, 3 (aj) [Entry date 12/14/93]
12/13/93	68	JURY verdict of guilty as to Abel Martinez Salazar (1) counts 1, 2, 3 (aj) [Entry date 12/14/93]
12/13/93	69	JURY instructions (aj) [Entry date 12/14/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/13/93	70	WITNESS list as to dft Celso Organista-Dorantes (aj) [Entry date 12/14/93]
12/13/93	71	WITNESS list as to dft Abel Martinez Salazar (aj) [Entry date 12/14/93]
12/13/93	72	EXHIBIT list of Celso Organista-Dorantes (aj) [Entry date 12/14/93]
12/13/93	73	JURY list re Abel Martinez Salazar, Celso Organista-Dorantes (aj) [Entry date 12/14/93]
12/13/93	74	JUDGMENT of acquittal by Judge Earl H. Carroll for Celso Organista-Dorantes (re: judgment [74-1] (cn) [Entry date 12/15/93]

DATE	DOCKET NUMBERS	DOCKET ENTRY
12/17/93	75	ORDER by Judge Earl H. Carroll that exhibits marked and/or admitted in this case are to be returned to cnsl/ agents of record who are directed to retain custody of them until the case has been completely terminated, including all appeals (re: order [75-1] (cn) [Entry date 12/20/93]
1/28/94	76	PAYMENT voucher by Judge Earl H. Carroll as to Abel Martinez Salazar for CJA atty Bernardo Mario Garcia (mm) [Entry date 02/01/94]
2/4/94	77	SENTENCING Memorandum filed by Tomas Velez-Giles (mm) [Entry date 02/09/94]
2/7/94	78	PAYMENT voucher by Judge Carroll as to Celso Organista-Dorantes for CJA Benny Lucero (aj) [Entry date 02/09/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
2/9/94	79	(FILED: 2/11/94 MINUTES: before Judge Earl H. Carroll Ct Rptr: Bridget Brittan Interpreter: Lita Van Duzer sentencing for Tomas Velez-Giles before Judge Earl H. Carroll (ls) [Entry date 02/15/94]
2/11/94	80	PLEA agreement filed as to Tomas Velez-Giles (ls) [Entry date 02/15/94]
2/11/94	81	STATEMENT of reasons for imposing sentence as to Tomas Velez-Giles by Judge Earl H. Carroll (ls) [Entry date 02/15/94]
2/11/94	82	PRESENTENCE report as to Tomas Velez-Giles (original is sealed and held in probation office) (ls) [Entry date 02/15/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
2/11/94	83	JUDGMENT and Commitment issued as to Tomas Velez-Giles Tomas Velez-Giles (2) count(s) 2, 3 . Dismissed on gvt motion, sentencing for Tomas Velez-Giles (2) count(s) 1. CBOP for SIXTY (60) MONTHS, followed by 48 months supervised release. S/A: $50 ; ordered by Judge Earl H. Carroll (ls) [Entry date 02/15/94]
2/18/94	85	NOTICE OF APPEAL by dft Tomas Velez-Giles from District Court appealing sentence (cc: 9CCA/All Counsel) (seal) [Entry date 02/25/94]
2/23/94	84	PAYMENT voucher by Judge Earl H. Carroll as to Celso Organista-Dorantes for CJA atty Gregory Anthony Bartolomei (mm) [Entry date 02/25/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
2/28/94	86	ORDER by Judge Earl H. Carroll that a copy of the Notice to File an Appeal filed by dft Tomas Velez-Giles be sent with this order to Atty Richard Juarez (re: order [86-1] (mm) [Entry date 2/28/94]
2/28/94	87	ORDER for 9CCA Time Schedule as to Tomas Velez-Giles [Entry date 02/28/94]
3/4/94	88	MOTION (Letter from dft) to reduce sentence (to rescind sentence due to illness of dft) [88-1] by Tomas Velez-Giles (mm) [Entry date 03/09/94]
3/7/94	90	(FILED: 3/9/94) MINUTES: before Judge Earl H. Carroll Ct Rptr: Bridget Brittan Interpreter: Lita Van Duzer sentencing for Abel Salazar before Judge Earl H. Carroll (ls) [Entry date 03/10/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
3/9/94	89	ORDER by Judge Earl H. Carroll denying motion to reduce sentence (to rescind sentence due to illness of dft) [88-1] by Tomas Velez-Giles (mm) [Entry date 03/09/94]
3/9/94	91	STATEMENT of reasons for imposing sentence as to Abel Martinez Salazar by Judge Earl H. Carroll (ls) [Entry date 03/10/94]
3/9/94	92	PRESENTENCE report as to Abel Martinez Salazar (original is sealed and held in probation office) (ls) [Entry date 03/10/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
3/9/94	93	JUDGMENT and Commitment issued as to Abel Martinez Salazar sentencing for Abel Martinez Salazar (1) count(s) 1, 2 , 3 . CBOP for SIXTY-THREE (63) MONTHS on Counts I and II, to be served concurrently. A term of 48 months supervised release on Counts I and II to be served concurrently. As to Count III, CBOP for SIXTY (60) MONTHS, to be served consecutively with Counts I and II. A term of 36 months supervised release is imposed, to be served consecutively with the term of supervised released imposed in Counts I and II. S/A: $150., Case closed.; ordered by Judge Earl H. Carroll (ls) [Entry date 03/10/94]
3/14/94	94	NOTICE OF APPEAL by dft Abel Martinez Salazar from District Court appealing sentence (cc: 9CCA/All Counsel) (ls) [Entry date 03/15/94]

DATE	DOCKET NUMBERS	DOCKET ENTRY
3/16/94	—	Notification by 9CCA of Appellate Docket Number 94-10122 as to Tomas Velez-Giles (ls) [Entry date 03/16/94]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 94-10158

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ABEL MARTINEZ SALAZAR, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET ENTRY
1994	
3/24/94	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 3/14/94; setting schedule as follows: transcript shall be ordered by 4/4/94 for Abel Martinez Salazar; Fee payment due 4/7/94; transcript shall be filed by 5/4/94; appellants' briefs, excerpts due by 6/13/94 for Abel Martinez Salazar; appellees' brief due 7/13/94 for USA; appellants' reply brief due by 7/27/94 for Abel Martinez Salazar. (RT required: yes) (Sentence imp 63mo) [94-10158] (vt) [94-10158]

DATE	DOCKET ENTRY
6/7/94	Filed certificate of record on appeal RT filed in DC 06/02/94 [94-10158] (tm) [94-10158]
6/13/94	14 day oral extension by phone of time to file Appellant in 94-10158 brief. [94-10158] appellants' brief due 6/27/94; appellees' brief due 7/27/94; optional reply brief is due 14 days from service of the answering brief. (mag) [94-10158]
6/29/94	Received Appellant Abel Martinez Salazar in 94-10158's brief in 15 copies 15 pages (Informal: no) fee not paid: notified counsel. Served on 6/27/94 [94-10158] respnse to brief deficiency notice due 7/13/94; (vt) [94-10158]
7/28/94	Received orig. 15 copies USA in 94-10158's brief of 16 pages; served on 7/26/94 deficient: appellant's brief not filed [94-10158] (tm) [94-10158]
8/12/94	Received notification from District Court (by Phone) of payment of docket fee (date paid: 04/05/94) [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
8/12/94	Filed original and 15 copies Appellant Abel Martinez Salazar's opening brief (Informal: n) 15 pages and five excerpts of record in 1volumes; served on 6/27/94 [94-10158] (tm) [94-10158]
8/12/94	Filed original and 15 copies appellee USA in 94-10158's 16 pages brief, 1 Exc. vols: ; served on 7/26/94 [94-10158] (tm) [94-10158]
8/12/94	Filed original and 15 copies Abel Martinez Salazar's reply brief, (Informal: n(9 pages; served on 8/10/94 [94-10158] (tm) [94-10158]
9/8/94	Filed, as of 06/07/94 , certified record on appeal in 8 Vols.(total): 1 Clerks Rec 7 RTs (orig)NOTE: SAME RECORD FOR 94-10122 [94-10158] [94-10158] (tm) [94-10158]
9/30/94	Calendar check performed [94-10122, 94-10158] (th) [94-10122 94-10158]
10/19/94	Calendar materials being prepared. [94-10122, 94-10158] [94-10122, 94-10158] (dd) [94-10122 94-10158]

DATE	DOCKET ENTRY
10/26/94	CALENDARED: San Francisco Dec. 16, 1994 9:00 a.m. Courtroom 2 [94-10122, 94-10158] (dd) [94-10122 94-10158]
12/5/94	Order filed: The court is informed of Defendant Tomas Velez-Giles' death; his appeal is dismissed as moot. This order does not affect the pendency of USA v. Martinez-Salazar, 94-10158, the co-defendant's appeal. (Procedurally Terminated After Other Judicial Action; Dismissed/ Other. Thomas TANG, author; Stephen R. REINHARDT; Pamela A. RYMER.) ([94-10122] (dg) [94-10122]
12/16/94	ARGUED AND SUBMITTED TO Thomas TANG, Stephen R. REINHARDT, Pamela A. RYMER [94-10158] (crw) [94-10158]
1995	
4/24/95	Sent copy of order of 04/24/95 (Copy of order to D.C. and Frederick F. Kay, FPD) [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
4/24/95	Filed order (Thomas TANG, Stephen R. REINHARDT, Pamela A. RYMER): Because defendant-appellant's counsel adopted an "Anders position" at oral argument as to whether a constitutional violation resulted from the d.c.'s refusal to dismiss Juror Gilbert for cause, we have applied procedures set forth in Anders v. State of CA. The court on its own motion relieves defendant-appellant's counsel. New counsel shall be appointed by separate order. New counsel shall submit a supplemental brief addressing the following questions . . . The supplemental brief shall be no more than 15 pages in length and shall be submitted within 21 days of the date of appointment of new counsel. The government shall then submit a brief in response of no more than 15 pages within 14 days of the date on which appellant's supplemental brief is due. The clerk shall serve a copy of this order on Frederick F. Kay, who will locate counsel to be appointed. The d.c. shall provide this court with the name and address of such counsel within 14 days of the appointment. Submission is ordered vacated. (SEE CASEFILES FOR COMPLETE TEXT) [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
5/22/95	Filed original and 15 copies Appellant Abel Martinez Salazar's supplemental brief of 14 pages, served on 5/18/95 (PANEL) [94-10158] (tm) [94-10158]
6/5/95	Filed original and 15 copies Appellee's supplemental brief of 13 pages, served on 6/1/95 (PANEL) [94-10158] (tm) [94-10158]
6/29/95	Filed USA's additional citations, served on 6/27/95 (PANEL) [94-10158] (tm) [94-10158]
8/3/95	FILED CERTIFIED RECORD ON APPEAL IN 01 VOLS.(total): 01 CLERKS REC; 0 RTs (ORIG) [94-10158] [94-10158] (ot) [94-10158]
8/4/95	Filed order (Deputy Clerk: CAC) Due to the death of Judge Tang, Judge Hawkins has been drawn to replace him on the pnl. [94-10158] (ot) [94-10158]
8/11/95	Filed Appellant Abel Martinez Salazar's motion to to appear and argue merits of the case; served on 8/8/95 (PANEL) [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
8/16/95	Filed USA's additional citations, served on 8/14/95 (PANEL) [94-10158] (tm) [94-10158]
1996	
6/17/96	Filed Abel Martinez Salazar's additional citations, served on 6/13/96 ***RECORDS FOR MERITS PANEL*** [94-10158] (tm) [94-10158]
10/7/96	Filed Abel Martinez Salazar in 94-10158 additional citations, served on 10/4/96 PANEL [94-10158] (em) [94-10158]
10/18/96	Filed order (Deputy Clerk: GB) Oral argument in the above-entitled case shall be heard in SF on 11/21/96 at 10:00 am in Ctrm #1. (parties phoned) [94-10158] (em) [94-10158]
10/18/96	CALENDARED: San Francisco Nov. 21, 1996 10:00 a.m. Courtroom 1 [94-10158] (mw) [94-10158]
11/21/96	ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Pamela A. RYMER (by telephone), Michael D. HAWKINS [94-10158] (mlm) [94-10158]

DATE	DOCKET ENTRY
1997	
5/1/97	Filed order (Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS): The parties are requested to file simultaneous briefs on their respective position regarding Bailey v. US, 116 S. Ct. 501 (1995). The briefs shall consist of not more than 10 pages each and shall be filed within 21 days of the filed date of this order (due 5/21/97) Submission shall be vacated until further order from this court. [94-10158] (tm) [94-10158]
5/23/97	Filed original and 15 copies Appellant Abel Martinez Salazar's supplemental brief of 10 pages, served on 5/19/97 (PANEL) [94-10158] (tm) [94-10158]
5/27/97	Filed original and 15 copies Appellee USA's supplemental brief of 10 pages, served on 5/22/97 (PANEL) [94-10158] (tm) [94-10158]
7/9/97	Received Appellant Abel Martinez Salazar's letter dated 07/08/97 re: status of appeal. (Mailed copy of the docket rpt. to him. [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
7/17/97	Filed order (Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS): This case is resubmitted for decision as of the filed date of this order. (tm) [94-10158]
7/17/97	Case resubmitted on this date to Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS. (See previous deferral of submission.) Order filed: 07/17/97. [94-10158] (tm) [94-10158]
9/9/97	Received letter from pro se re: Status of Appeal. (Mailed copy of docket rpt.) (tm) [94-10158]
11/28/97	Received Abel Martinez Salazar's additional citations, served on 11/25/97 (PANEL) [94-10158] (tm) [94-10158]
1998	
1/30/98	Received Appellant Abel Martinez Salazar's letter dated 01/28/98 re: status of appeal (Mailed copy of docket rpt. to appellant) [94-10158] (tm) [94-10158]

DATE	DOCKET ENTRY
5/28/98	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen R. REINHARDT; Pamela A. RYMER; Michael D. HAWKINS, author.) FILED AND ENTERED JUDGMENT. [94-10158] (tm) [94-10158]
6/4/98	Filed motion and clerk order (Deputy Clerk: TMB) Appellee's motion for an extension of time to file a petition for rehearing and suggestion for rehearing en banc is granted. The petition for rehearing is due 7/13/98. (Motion recvd 06/04/98) [94-10158] (tm) [94-10158]
7/13/98	Filed original and 40 copies Appellee USA's petition for rehearing with suggestion for rehearing en banc 12 p.pages, served on 7/13/98 (PANEL AND ALL ACTIVE JUDGES) (tm) [94-10158]

DATE	DOCKET ENTRY
7/30/98	Filed order (Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS): Defendant-Appellant shall file a response to the Petition for Rehearing with Suggestion for Rehearing En Banc, filed with this court on 7/13/98, within 21 days from the date of this order. [94-10158] (tm) [94-10158]
8/17/98	Filed Appellant's response to appellee's petition for rehearing with suggestion for rehearing en banc; served on 8/11/98 (PANEL AND ALL ACTIVE JUDGES) [94-10158] (tm) [94-10158]
10/7/98	Filed order (Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS). . . . The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED. (FOR COMPLETE TEXT SEE ORDER) [3486543-1] [94-10158] (rc) [94-10158]
10/14/98	Filed USA in 94-10158 motion to stay the mandate for 30 days, to and including 11/13/98, pending review for application for writ of certiorari. (faxed to author). [94-10158] served on 10/13/98 [3544492] (db) [94-10158]

DATE	DOCKET ENTRY
10/14/98	Filed order (Michael D. HAWKINS): Appellee's motion to stay the mandate for 30 days, to and including 11/13/98, pending consideration of the filing of a petition for writ of certiorari is GRANTED. (Atys. notified) [94-10158] (tm) [94-10158]
11/13/98	Filed aple's second motion to stay the mandate pending review for application for petition for writ of cert. (requesting stay until 1/5/99) (faxed to author) [94-10158] served on 11/12/98 [3564460] (db) [94-10158]
11/18/98	Filed order (Michael D. HAWKINS) The US's second motion to stay the mandate to and including 1/5/99 is GRANTED. [94-10158] (tm) [94-10158]
12/30/98	Filed USA in 94-10158 third motion to stay the mandate. (faxed to author) [94-10158] served on 12/28/98 [3591275] (db) [94-10158]

DATE	DOCKET ENTRY
1999	
1/6/99	Filed order (Michael D. HAWKINS): The United States's third motion to stay the mandate to and including 2/4/99, pending the filing of a petition for certiorari, is GRANTED. [94-10158] (tm) [94-10158]
1/7/99	Received letter from the Supreme Court dated 1/4/99 re: extension of time to file cert (extension granted to and including 2/4/99) [94-10158] (tm) [94-10158]
2/11/99	Received notice from Supreme Court: petition for certiorari filed; Supreme Court No. 98-1255, filed on 2/4/99 and placed on the docket 2/5/99. [94-10158] (rc) [94-10158]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-93-284 PHX

UNITED STATES OF AMERICA, PLAINTIFF

v.

ABEL MARTINEZ SALAZAR, TOMAS VELEZ-GILES, AND CELSO ORGANISTA-DORANTES, DEFENDANTS

INDICTMENT

VIO: 21 U.S.C. § 846 (Conspiracy to Possess with Intent to Distribute Heroin)
COUNT 1

21 U.S.C. § 841(a)(1) (Possession with Intent to Distribute Heroin)
COUNT 2

18 U.S.C. § 924(c)(1) (Use of a Firearm During and in Relation to a Drug Trafficking Crime)
COUNT 3

THE GRAND JURY CHARGES:

COUNT 1

Beginning on or about July 22, 1993, and continuing up to and through July 27, 1993, in the District of

Arizona and elsewhere, defendants ABEL MARTINEZ, TOMAS VELEZ-GILES and CELSO ORGANISTA-DORANTES did knowingly, willfully and unlawfully conspire, combine and agree with other persons known and unknown to the grand jury, to possess with intent to distribute heroin, a Schedule I Drug Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(i).

All in violation of Title 21, United States Code, Section 846.

COUNT 2

On or about July 27, 1993, in the District of Arizona, defendants ABEL MARTINEZ, TOMAS VELEZ-GILES and CELSO ORGANISTA-DORANTES did knowingly, willfully and unlawfully possess with intent to distribute heroin, a Schedule I Drug Controlled Substance.

In violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(i).

COUNT 3

On or about July 27, 1993, in the District of Arizona, defendants ABEL MARTINEZ, TOMAS VELEZ-GILES and CELSO ORGANISTA-DORANTES, did knowingly use and carry two firearms, that is a Glock Model 17, 9 mm semi-automatic pistol, serial #H6058, and an Interarms, .38 Special revolver, Serial #W120169, during and in relation to a drug trafficking crime as defined in Title 18, United States Code, Section 924(c)(2) and Title 21, United States Code, Section 802 *et seq.*, that is possession with intent to distribute heroin, as alleged in Court 2 of this indictment.

In violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL

SIGNATURE ILLEGIBLE
FOREPERSON OF THE GRAND JURY
Date: August 24, 1993

JANET NAPOLITANO
United States Attorney
District of Arizona

SIGNATURE ILLEGIBLE
VINCENT Q. KIRBY
Assistant U.S. Attorney

United States District Court
District of Arizona

UNITED STATES OF AMERICA

V.

ABEL SALAZAR-MARTINEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-93-284-01-PHX-EHC

SSN: 523-26-9869

Madison Street Jail

Bernardo Garcia, Appt'd
Attorney for Defendant

[Filed: March 9, 1994]

THERE WAS A:

[ ] finding [X] verdict] of guilty as to counts(s) I, II and III

[ ] finding [ ] verdict] of not guilty as to count(s) _____

[ ] judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/these count(s)

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title 21, Section 846, Conspiracy to Possess with Intent to Distribute Heroin - Count I

Title 21, Section 841(a)(1), Possession with Intent to Distribute Heroin - Count II

Title 18, Section 924(c)(1), Use of a Firearm During and in Relation to a Drug Trafficking Crime - Count III

IT IS THE JUDGMENT OF THIS COURT THAT:

Defendant is committed to the custody of the Bureau of Prisons for imprisonment for a period of SIXTY-THREE (63) MONTHS on Counts I and II, to be served concurrently. A term of supervised release of FORTY-EIGHT (48) MONTHS, on Counts I and II is imposed, to be served concurrently. As to Count III, the defendant is sentenced to SIXTY (60) MONTHS imprisonment, to be served consecutively with Counts I and II. A term of THIRTY-SIX (36) MOTNHS supervised release is imposed, to be served consecutively with the term of supervised release imposed in Counts I and II. Within 72 hours of release from custody, the dft. shall report in person to the probation office in the district to which he is released. While on supervised release the defendant shall comply with the standard conditions of supervised release, as adopted by in General Order #201 and the following special conditions: 1. Defendant shall submit to search of person, property, vehicles, business, and residence, to be conducted in a reasonable time and place, by, or at the direction of, the probation officer. 2. Shall participate as instructed by the probation officer in a program approved by probation, for substance abuse treatment, which may include testing for substance abuse. Defendant shall also abstain from the use of alcohol and all other intoxicants during the period of supervised release. 3. Shall participate in a mental health program as directed by the supervising probation officer, which may include taking prescribed medication. 4. Shall not re-enter the United States without legal authorization. No fine shall be imposed, the Court finding that the defendant's lack of assets make it unlikely that he will be able to pay a fine. Any monies earned during incarceration are to be paid to his

family through the inmate Financial Responsibility Program. Defendant is advised of his right to appeal the sentence within 10 days.

In addition to any conditions of probation/supervised release _____ ____ _____. IT IS ORDERED.

CONDITIONS OF PROBATION/SUPERVISED RELEASE

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work, notify your probation officer at once and consult him prior to job changes);

(4) not leave the judicial district without the permission of your probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow your probation officer's instructions, report as directed, and comply with any general or special conditions pursuant to District of Arizona General Order 201.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less then the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the defendant shall immediately pay to the Clerk of the Court a total special assessment of $150.00 pursuant to Title 18, U.S.C. Section 3013 for count(s)

I, II and III as follows;
immediately. May be collected during period of imprisonment through the Inmate Financial Responsibility Program. Unpaid balance made a condition of supervision.

IT IS FURTHER ORDERED that counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States Attorney for this district any amount imposed as restitution. The defendant shall pay to the Clerk of the Court any amount imposed as a fine and as a cost of prosecution. Payment of such amount is due immediately but, if so ordered shall be payable in equal monthly installments with payment in full by a date certain. In all cases restitution, fines, and costs shall be payable during the period of incarceration with the payment of any remaining balance to be a condition of probation or supervised release. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the United States Attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this judgment to the United States Marshal of this district.

[_] The Court orders commitment to the custody of the Bureau of Prisons and recommends:

March 7, 1994
Date of Imposition of Sentence

EARL H. CARROLL
Signature of Judicial Officer

Earl H. Carroll
United States District Judge
Name and Title of Judicial Officer

cc:
U.S. Marshal (2)
Probation/PTS (3)
U.S. Attorney (1)
Immigration (1)
Atty for Dft (1)
Defendant ( )
Judge (1)
Order Finance (1)
B of D (2)
Initials: __

3/9/94

March 8, 1994
Date

RETURN

I have executed this Judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal case.

_____
United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR 93-284-PHX-EHC

THE UNITED STATES, PLAINTIFF

v.

ABEL MARTINEZ-SALAZAR,
CELSO ORGANISTA-DORANTES, DEFENDANTS

TRANSCRIPT OF JURY TRIAL

December 7, 1993

[2]

THE CLERK: Criminal 93-284, *United States of America v. Abel Martinez-Salazar and Celso Organista-Dorantes* on for jury trial.

MR. KIRBY: Good morning, Your Honor. Vincent Kirby on behalf of the United States.

MR. GARCIA: Good morning, Your Honor. Bernardo Garcia for Mr. Abel Martinez-Salazar.

MR. BARTOLOMEI: Morning, Your Honor. Gregory Bartolomei on behalf of Celso Organista-Dorantes present in court.

THE COURT: All right, thank you. Any matters that we need to discuss before we expect the jury to come up?

MR. BARTOLOMEI: Not really, Your Honor. I would request to invoke the rule regarding witnesses.

THE COURT: All right. Well, the witnesses will be excluded, and the parties should tell any witnesses that they have that they are excluded from the courtroom. They're not to be present in the courtroom at any time, including after for final arguments unless ordered by or allowed by the Court. And so you should tell them that, and they shouldn't discuss their testimony with anyone other than the lawyers involved in the case, and that's your responsibility to tell them that.

Anything else? With respect to the defendants, [3] what order for the defendants? Any particular order that we're going to have?

MR. GARCIA: Your Honor, I believe that Mr. Abel Martinez-Salazar will go first.

THE COURT: You go first —

MR. GARCIA: Yes, Your Honor.

THE COURT: — is what you're saying. All right. Is that agreeable?

MR. BARTOLOMEI: Yes, it is, Your Honor.

THE COURT: All right. And then if there's some reason to change on a particular witness, why, we can

discuss that or it can be done. But just so the jury will have an idea about it.

You also know that we don't reserve opening statements by the defense. So be prepared to make those following the Government's opening statement. Opening statements are intended to be factual in character, what you expect the evidence to be. And then final argument, you can become more eloquent about the benefits of the judicial system in the United States and things like that. So if you'd do that, that would be helpful too.

We have the questionnaire that's being filled out downstairs. And so we will pick that up when it's completed, and put it in alphabetical order. And then you'll get a copy. We'll give you all a copy of the questionnaires that [4] have been filled out by the jury. And then mid-morning recess, perhaps after that we can—you can look at them during that time, and see which ones you may want to come in for some individual questioning, and then we will do that as a part of the process.

We'd hoped to be able—I would hope to be able to pick the jury by early afternoon so we could get opening statements out of the way at least. I neglected to advise you all—and I apologize because there are just a number of things happening, but we will not have trial tomorrow. I asked the clerk to call you after court yesterday to explain to you, a lawyer, James Hawthorne White died in Nogales, and I'm really committed to go to his services tomorrow morning at 11:00 in Nogales.

So we'll have a full day then, or we'll accommodate Mr. Garcia's schedule Thursday afternoon. I would hope that we'd be able to complete the trial on Friday without pressure on anyone. If necessary we'd continue it on Monday or Tuesday morning, as necessary. So we'll work it out in that fashion. And I hope it doesn't inconvenience any of you to too great an extent. So that's what we'll be doing there.

Yes, Mr. Garcia.

MR. GARCIA: Your Honor, it was my understanding, and I believe it was also Mr. Bartolomei's understanding that we would start opening arguments on Thursday afternoon. And [5] I believe that if we started at that time, there's still a very good chance we'll be done by Friday.

THE COURT: Opening arguments on Thursday afternoon?

MR. GARCIA: That was my understanding.

THE COURT: No. If we have time we're going to do it this afternoon.

THE CLERK: No. I didn't say that. Mr. Garcia had asked you about recessing Thursday morning.

THE COURT: Was it Thursday morning that you wanted out?

MR. GARCIA: Yes.

THE COURT: I thought it was Thursday afternoon. But in any event, whatever your schedule is—

MR. GARCIA: No, Your Honor.

THE COURT: If we have time this afternoon we're going to have opening arguments—or opening statements. They're not arguments, opening statements—

MR. GARCIA: Yes —

THE COURT: —this afternoon and evidence, if we can. And then we will—how long is your time Thursday morning?

MR. GARCIA: The morning, Your Honor.

THE COURT: What are you doing?

MR. GARCIA: I have a pretrial conference with [6] attorneys coming in from various—

THE COURT: Right. Well, what time is it scheduled for?

MR. GARCIA: It is scheduled for 9:00 in the morning in Mesa, Your Honor.

THE COURT: Well, I'll call the judge, also and find out how long he plans on having it. It's hard for me to imagine a pretrial conference going three hours. Do you think it will?

MR. GARCIA: That's correct, Your Honor. The matter wasn't—yesterday I told you it was in front of Judge Swartz. It's in front of Judge Hendricks and it's in Mesa.

THE COURT: Judge who?

MR. GARCIA: Hendricks, Your Honor.

THE COURT: Cheryl Hendricks?

MR. GARCIA: Yes, Your Honor.

THE COURT: All right. Well, I'll call and see. You know, I'm certainly going to give you time to do it, but it would be most unusual to have a three hour pretrial conference.

MR. GARCIA: Your Honor, I would anticipate that it would be over by 9:30, 10:00, and that it would take me about an hour to drive back from Mesa.

THE COURT: From Mesa? Well, we'll speed you up [7] all the way through your life, Mr. Garcia.

MR. GARCIA: Thank you, Your Honor.

THE COURT: So we'll plan on maybe starting around 11:00 Thursday morning. But in any event, we want to give everybody a chance to get where they're going.

Anything else?

MR. KIRBY: Your Honor, in terms of—I'm certainly prepared to go to opening statements. My information was we weren't doing any trial testimony, and I called off my witnesses until Thursday.

THE COURT: Well, quite likely that'll be fine. If we get the opening statements in, that would be good, however.

All right. Well, our procedure this morning, we're going to get the jury panel up in a few minutes and seat them, and then randomly call them after that to be seated, and give them a piece of paper at some time, and they can stand up and give us that information.

Then we'll have the questionnaires completed and go through that process. So do you think they're about ready downstairs, Bobby?

The folks that are here in the back of the courtroom, do you speak English, the three of you? You all speak English? Because I was going to say, if you didn't, we have some of the headsets that you could listen to. Maybe [8] you already—anyone have any of those? No.

All right. And I would also ask you, if you would just while we're seating the jury, what do you think, Bobby, in the back row, put them in the back row? If you'd just be seated in the back row. And then when—so we can have the jury all seated, and then after that you can come back up. So that'll help us out there. And so why don't you, when they come up, Bobby, then keep the first two rows. Ask them to—

THE CLERK: Yes.

THE COURT: Don't you think? Maybe she could tell them downstairs; don't you think?

THE CLERK: Sure.

THE COURT: So are we ready to get them up?

THE CLERK: Yeah, I'm doing it now. I'm asking now.

THE COURT: Okay. Well, let me know when they're here, and then we'll get ready to go. Nothing else.

Remember, also with respect to objections, if you have any objections, hearsay, foundation, that's it. You want to discuss them, we do it up by the bench.

Are we set up to do things in the jury room if we need to? You got yourself set up. Okay, fine.

So when we do the individual questions generated by the questionnaires, we'll do that in the jury room. And of [9] course, the defendants can be in there while we do that as well. So keep that in mind. So we'll get organized then and get started.

(Recess from 9:10 a.m. to 9:32 a.m.)

THE COURT: Thank you very much. Be seated, please.

THE CLERK: Criminal 93-284, *United States of America v. Abel Salazar and Celso Organista-Dorantes*, on for criminal jury trial.

MR. KIRBY: Good morning, Your Honor. Vincent Kirby on behalf of the United States.

MR. GARCIA: Good morning, Your Honor. Bernardo Garcia on behalf of Mr. Abel Martinez-Salazar.

MR. BARTOLOMEI: Good morning, Your Honor. Gregory Bartolomei on behalf of Celso Organista-Dorantes.

THE COURT: All right. Members of the jury panel, we will have a certain general procedure that we're going to follow this morning, and we will—I'll tell you briefly about that after we have you stand and be sworn by the Court clerk. So if you'd do that.

(Jury Panel Sworn)

THE COURT: All right. We have, I'm told, 44 of you here for this purpose, and so it takes a little time for us to get information from you and to tell you something about the trial. And that's what we will be doing this [10] morning and certainly into the early afternoon at least.

It's necessary during this process that you all be able to hear me, and during the process also that we all be able to hear you. And so we'll remind you of that from time to time. But it's necessary as we get information from you that you speak up. We'll have a hand-held microphone to try to assist you in doing that.

Sometimes the microphone acts a little ornery and we can't use it too well, but we try. And so we'll be doing that.

And then in the process, very shortly you're going to be called to be randomly seated, mixed up as you're being seated, and we'll try to do that in an orderly fashion.

Just to tell you about our system, we're trying to do it. Usually I have a law clerk, called a bailiff, come in and help with that, but we're going to try to keep that person working on other matters in chambers, and so we will try to get you all seated appropriately without that.

Our process is to start off in the jury box and seat people there, and then across this rail, there's a seat in front of the railing here, put people there and in the next couple of rows back. And so that's the reason we ask you not to sit in those rows.

And so once we get you seated and get your names, then we'll get some other initial information, tell you a little about the trial and our trial schedule to see how that [11] impacts on any of you.

So our first order of business then is going to be randomly seating you. I'm told you that you received a little slip of paper. Keep that with you, because once we get you seated, at some time then we're going to ask you all to stand, keep that piece of paper in front of you and give us that information that's requested there. So that's what we'll be doing. And so it'll take us a little time now to seat all of you. Remember also you have to

stay together here while we're doing this. So if someone thinks they have to step outside for some reason, hold up your hand and we'll have to take a recess.

It's 9:30. You got downstairs at least by 9:00 or earlier I'm sure, and so you've been in the building for a little time. We'll take a recess at 10:30, quarter to 11:00, somewhere in there, 10:30 perhaps, so that you can step outside and so that I can also discuss with the lawyers during the recess the questionnaire that you filled out downstairs. And so we'll be doing—that's kind of generally what we'll be doing.

And so to introduce myself, my name is Earl H. Carroll. I'm a United States district judge, and it's my responsibility to preside at the trial here. And we're on the sixth floor and simply called Division 6 by our numbering system. So you can keep that in mind as well.

[12] So in any event, now, Ms. Hightower, who is seated on my left here, is going to call your names randomly. She'll call your name, spell your last name for us, and then we will direct you how to be seated here. So be patient with us and we'll get that done.

THE CLERK: Alvin Mann, M-A-N-N, just come up here and be seated.

THE COURT: When you step into the jury box, there's a little step coming up off the floor, and it's kind of dark there. So be careful as you all come up and do that.

Mr. Mann, if you'd just go in the back row all the way over. Thank you.

THE CLERK: John Kelly, K-E-L-L-Y.

THE COURT: Just be seated. Thank you.

THE CLERK: Robert Johann, J-O-H-A-N-N; Neal Sundeen, S-U-N-D-E-E-N; Cynthia Gordon, G-O-R-D-A-N; Silvio Vaninetti, V-A-N-I-N-E-T-T-I; Robert Rendek, R-E-N-D-E-K; Martin Johnson, J-O-H-N-S-O-N.

THE COURT: Mr. Johnson, just come up and be seated in the front row. We'll leave that back chair empty there. It's behind the post, really. It's impaired vision.

THE CLERK: Christopher Lanford, L-A-N-F-O-R-D; Ronald Eckard, E-C-K-A-R-D; Joel Schotz; S-C-H-O-T-Z; Reba Varela, V-A-R-E-L-A; Robert Dunst, D-U-N-S-T; Edward Sink, S-I-N-K.

[3] THE COURT: Mr. Sink, just come over here and be seated all the way down at this end. Thank you.

THE CLERK: Mary—

THE COURT: Just right here inside.

THE CLERK: Mary Smith, S-M-I-T-H; Mark Gilmore, G-I-L-M-O-R-E; Merle Baker, B-A-K-E-R; Robert Schroeder, S-C-H-R-O-E-D-E-R; Barbara Schaller, S-C-H-A-L-L-E-R; Julie Colomitz, C-O-L-O-M-I-T-Z (sic).

JUROR/KOLOMITZ: Ma'am, the spelling on that is wrong. It starts with a "K."

THE CLERK: All right. Thank you. Dennis Hultz, H-U-L-T-Z; Joe Bollinger, B-O-L-L-I-N-G-E-R; Richard Conn, C-O-N-N; Susan C-H-M-I-E-L-E-W-S-K-I; Darvin Finck, F-I-N-C-K; Mary Simmonds, S-I-M-M-O-N-D-S.

THE COURT: If you'd just come up and be seated in the first seat behind the rail there.

THE CLERK: Martin Welter, W-E-L-T-E-R-; Kimberly Keil, K-E-I-L; Etoy Hanserd, H-A-N-S-E-R-D; Christine Pelander, P-E-L-A-N-D-E-R, Pelander; Donald Gilbert, G-I-L-B-E-R-T; Arnold Riley, R-I-L-E-Y; Julie Ball, B-A-L-L; James Allen, A-L-L-E-N; Francisco Olivas, O-L-I-V-A-S; Darryl Bingham, B-I-N-G-H-A-M; Doria Morlan, M-O-R-L-A-N; Shuhui Fan, F-A-N; Clifford Schlueter, S-C-H-L-U-E-T-E-R; Jeffrey Smith, S-M-I-T-H; Cynthia Wineman, W-I-N-E-M-A-N; Jeannie Collins, C-O-L-L-I-N-S; Georgia Lindsey, L-I-N-D-S-E-Y; [14] Bonnie Baker, B-A-K-E-R; John Velez, V-E-L-E-Z.

Is there anyone whose name I didn't call?

THE COURT: All right. Thank you very much now. We'll be going on and getting some more information.

Before we do that, let me just tell you briefly about our time schedule. And if any of you have some problem that creates some serious situation for you to be here, why, hold up your hand. We'll get your name and get that information so we can consider it.

Today is Tuesday, of course. The reason we have as many of you here as we do, we're going to pick a jury of 13 people, but we need that many of you in order to pick that number of jurors. The parties can excuse a certain number of people on the jury, and some will have conflicts or other matters. And so we need that many of you here to pick the jury.

We will get the jury picked today. We may have opening statements later in the afternoon. We may not. We won't have any testimony today.

Tomorrow we're not going to be in court. Another matter has occurred, and so we won't be in trial tomorrow. We'd probably have you back Thursday morning, 11:00 or something like that because of other matters that are scheduled with the parties involved. Every time we have a trial, and the more people that are involved in the trial, [15] the more problems we have getting everybody to be available. We all have to be available at the same time: the parties, the lawyers, the witnesses, the jury. And so it does, it creates a problem of simply getting everyone together.

So we'd have trial Thursday, an hour in the morning perhaps, Thursday afternoon, Friday. If necessary, we would conclude the trial on Monday. That's about what we're looking at timewise. It may be a little longer. It may be a little shorter. It's always difficult to know exactly how long the trial will go.

Our normal trial day is from 9:00 in the morning, we have a recess in the morning for 20, 25 minutes so everyone can step outside. We take a lunch break for an hour, an hour and 15 minutes in the middle of the

day. We have a recess in the afternoon. We ordinarily stop some time around 4:00, 4:15 in the afternoon. I have concluded, in my own experience watching people and seeing jurors, and really the intensity of a trial and sitting and concentrating and listening carefully, that's about the maximum time I think that people can really sit, concentrate and be good jurors.

Also it's helpful, I think—people have other matters scheduled, picking up children, things like that. And so we try to get you out of the building so that you can get on your way before the traffic builds up. So that's what our schedule will be.

[16] Now, recognizing that, is there anyone now on the jury panel that has any problems, medical appointments, trips overseas, things like that, that would prevent you from being with us through next Monday if necessary? So we always start in the jury box to have people hold up their hand, the back row and the front row, and then go by row. So if anyone in the jury box has any problem, please hold up your hand and tell us what it is for that schedule, and then we can make a note of it, and see what we'll do. Anyone in the jury box?

JUROR/SUNDEEN: My name is Neal Sundeen, and I have a trial set on Monday and Tuesday of next week. I'm a lawyer.

THE COURT: And that's—

JUROR/SUNDEEN: In the superior court.

THE COURT: And who's the judge?

JUROR/SUNDEEN: Donahue.

THE COURT: All right, thank you. Well, we'll keep that in mind and see how we're doing and so forth.

All right. Anyone else in the jury box? Front row, anyone in the front row that has any problem for that period of time? All right. Second row, anyone in the second row have any problems? Third row, any problems? All right. Well, that's very good—very unusual, as a matter of fact.

If any of you—should occur to you, please let us know that you have something going. We sure don't want to [17] talk you into having any problems, whatever they may be. We don't want you to have any problems. But in any event, if it should occur to you during the trial, or during the selection process, let us know.

Oh, yes, sir. Your name, please.

JUROR/SINK: My name is Edward Sink.

THE COURT: Uh-huh.

JUROR/SINK: And I have been on vacation for two weeks from my work, and I just came back from a business trip for four days. And I'm having a hard time keeping up. And I don't know if this will have any bearing on whether or not I get selected. But I would like you to keep that in mind.

THE COURT: Who do you work for?

JUROR/SINK: Allied Signal Aerospace in Tempe.

THE COURT: All right, thank you. Well, we'll keep that in mind as we go along. Hopefully we'll have enough jurors that we really can accommodate any concerns that people have about their schedule. But we'll see how that goes. All right, all right. Yes, ma'am.

JUROR/MARY SMITH: I'm Mary Ellen. I've been excused once before, and I hesitate to ask for an excuse again. However, I'm an English instructor at one of the community colleges, and we're in exam week this week and next week. And while we can ask instructors to monitor our exams, we can't ask them to grade the 3- or 400 research papers, [18] essays and so forth.

THE COURT: Well, we'll let you do the honor system. Just let them go in, be by themselves. That'll help out. Well, we'll keep that in mind. Anyone else? All right, thank you.

Okay. Now, we're going to go through and have you give us the information that's called for on those little pieces of paper that we've handed each of you. And during that, I would ask you to stand up so that everyone can see you. And keep the piece of paper in front of you and speak up. And if we have any problems with the microphone, why, we'll try to adjust that. So we'll just go on across, and just hand the microphone from one to another. And so the first one we'll have is Mr. Mann.

JUROR/MANN: My name is Alvin Mann. I live in Miami, Arizona. I'm a supervisor for Magman Copper

Company at Pinto Valley Division. I have graduated high school, had some college and trade school, but I did not graduate college. I am separated presently.

My military service, I served honorably in the Navy three years, four months and 28 days, got an E-5.

My prior jury duty was in the third quarter of '93. I served on three criminal juries: sexual abuse, DUI and possession of controlled substance. The verdict on all three were guilty.

[19] THE COURT: Was that in Gila County Court?

JUROR/MANN: Yes, sir.

THE COURT: All right, thank you. Going on across then, Mr. Kelly.

JUROR/KELLY: My name is John Kelly. I'm from Phoenix, Arizona. I am a productivity industrial engineer. Basically that includes efficiency expert, increasing the productivity of employees and various work centers. I currently hold two bachelors degrees and I'm working on my masters.

Military service, United States Air Force, rank of captain, 10 years active duty.

Prior jury duty, fraudulent use—it was a criminal case, fraudulent use of credit card, and the individual was found guilty in May of 1990.

THE COURT: All right, thank you. What are we doing. Bobby, just a second. What did we do—

JUROR/JOHANN: My name is Robert Johann. I live in Mesa, Arizona. I'm retired. I have two years at ASU, no military service and no jury duty.

THE COURT: All right, thank you. We have our worse problem I think right under the speaker. So Mr. Sundeen, you have a loud clear voice. So you can do—

[20] JUROR/SUNDEEN: Thank you. My name is Neal Sundeen, and I live in northeast Phoenix. I'm an attorney. My wife is a realtor and a broker. I have 19 years of education. My wife has an MBA, 17 years of education.

I've been in the Army. I was an E-4 two years, and I have no prior jury duty.

THE COURT: Thank you. Ms. Gordon.

JUROR/GORDON: My name is Cindy Gordon. I live in northeast Phoenix. My position is a network administrator for an insurance adjusting company. My husband is a claims manager for an insurance company. My education is high school, some college. I did not graduate from college. I took law classes and computer classes. My husband has graduated from college. I have no military service and no prior jury duty.

THE COURT: Thank you.

JUROR/VANINETTI: My name is Silvio Vaninetti. I live in northwest Phoenix, actually in Peoria. I work for a general contracting firm. I'm a foreman and estimator. My duties require scheduling crews and running the work. I graduated from college at Arizona State, four-year degree. My wife as well. I have no military service, and I've had no prior jury duty.

THE COURT: Thank you, sir. All right. Going on then, Mr. Rendek.

JUROR/RENDEK: My name is Robert Rendek. I am retired from Armor & Company. My wife is a housewife. I [21] have four years of college education. My wife does not. My only military service was approximately eight years in the Illinois National Guard, where I obtained the rank of second lieutenant.

On jury service, I've been called in the midwest and was selected as a juror. And before it went to trial, a mistrial was called. And I was called in superior court here, but never again selected as a juror.

THE COURT: All right, thank you, sir. All right. Mr. Johnson.

JUROR/JOHNSON: My name is Martin Johnson, and I am an inspector of TRW vehicle safety systems. My wife is a housewife and works part-time as a paralegal. I graduated from high school, no military service and no prior jury duty.

THE COURT: Where do you live, what community?

JUROR/JOHNSON: Oh, excuse me, east Mesa.

THE COURT: Does your wife work for a particular firm as a paralegal?

JUROR/JOHNSON: Yes, sir.

THE COURT: And who is that?

JUROR/JOHNSON: Trying to remember now.

THE COURT: Do you know whether the firm —

JUROR/JOHNSON: It skipped my mind. I'm sorry.

THE COURT: Do you know whether the firm is involved in criminal or civil law or just what?

[22] JUROR/JOHNSON: It's criminal.

THE COURT: All right, thank you. All right. Then going on, Mr. Lanford.

JUROR/LANFORD: My name is Chris Lanford. I live in Phoenix, Arizona. My job is at Bill Luke Chrysler Plymouth. I'm an auto painter. I'm currently separated. I went to high school to the tenth grade. I went to vocational college and graduated through it. I've never been in the military service, and I've had no prior jury duty.

THE COURT: All right, thank you. Mr. Eckard.

JUROR/ECKARD: I'm Ronald Eckard and I live in east Mesa. I work at Leisure World doing landscaping. My wife works at Burger King. Education,

eleventh grade but I do have a GED. My wife works at Burger—my wife works—and my wife, eighth grade. Military service, I was in the military for three years, branch of Army, rank E-4. And prior jury duty, never did.

THE COURT: Thank you, sir. Mr. Schotz.

JUROR/SCHOTZ: My name is Joel Schotz. I live in Phoenix. I'm the branch manager for Myers Tire Supply here in Phoenix. My wife is a revenue clerk for America West Airlines. We both have a couple of years of college, no degree. No military service, and no prior jury duty.

THE COURT: All right, thank you. Ms. Varela.

JUROR/VARELA: My name is Reba Varela. I live in [23] Phoenix, Arizona. I'm a real estate manager with a management company. My husband is self-employed as a landscaper. I have a high school degree—high school diploma, a couple of years of community college off and on. My husband the same. No military service.

I've served on two juries prior to—one was a slip-and-fall case. That was not guilty. One was a fraud case. That was guilty.

THE COURT: All right, thank you.

JUROR/DUNST: My name is Robert Dunst. I live in Phoenix. I am president of Touchstone Community, which is a children's behavioral health agency. My wife is in property management. I have a master's degree in

social work. My wife is an RN—no military experience and no jury duty.

THE COURT: All right, thank you.

JUROR/SINK: My name is Edward Sink. I live in Chandler, Arizona. I am a program administrator for Allied Signal Aerospace, and my wife is a claims examiner for Blue Cross/Blue Shield. We both have high school graduation and some community college. No military service and I have no prior jury duty.

THE COURT: Ms. Smith.

JUROR/MARY SMITH: I'm Mary Ellen Smith. I live in Tempe. I'm a English instructor for Maricopa County Community Colleges. I have master's degree in English. I [24] have no military service, and no prior jury duty.

THE COURT: What community college do you teach at?

JUROR/MARY SMITH: South Mountain.

THE COURT: Pardon?

JUROR/MARY SMITH: South Mountain Community College.

THE COURT: Thank you. I go there every July the 4th. They have a naturalization ceremony on the 4th of July every year at South Mountain. It's a very nice program.

Mr. Gilmore, I like your jacket, incidentally.

JUROR/GILMORE: Thank you. I'm Mark Gilmore. I live in central Phoenix. I'm a supervisor at Harkin's Theaters. I have graduated high school. I have a year-and-a-half of community college. No military, no jury duty.

THE COURT: All right, thank you. Mr. Baker.

JUROR/MERLE BAKER: My name is Merle Baker. I live in east Mesa. I'm a retired truck driver and teamster business agent. My wife is retired. I have three years at the University of Wisconsin. I was in the infantry for a year-and-a-half, retired as—or honorably discharged as a corporal.

I was on prior jury duty in county court in Wisconsin, two different cases. One was an assault and battery case. It was a not guilty case. Another was a child [25] molestation case. That was not guilty.

THE COURT: All right, thank you. Mr. Schroeder.

JUROR/SCHROEDER: I'm Robert Schroeder. I live in Winchell Park. I work for Arizona Public Service as a rate engineer. My wife is a registered nurse with Phoenix Children's Hospital. Education: I have a masters in chemical engineering. My wife has an RN in nursing. No military service.

Was on a civil case in Texas involving a house in property problems, so—

THE COURT: All right, thank you. Ms. Schaller.

JUROR/SCHALLER: My name is Barbara Schaller. I live in northwest Phoenix. I'm a purchasing assistant at DeVry Institute. My husband is self-employed and has his own insurance agency. I have a bachelor's degree in business operations. My husband has some community college. I have no military. My husband was in the Marine Corps. I don't remember how long. He was, I believe, an E-5 sergeant. And I've had no prior jury duty.

THE COURT: Thank you.

JUROR/KOLOMITZ: My name is Julie Kolomitz. I live in Glendale, Arizona. I'm a grocery clerk at Safeway in Sun City West. I graduated from high school, no military service. And I served on a civil case, a contesting of a will in Navajo County.

[26] THE COURT: All right, thank you. Just a second. Pardon me. Go ahead, Mr. Hultz.

JUROR/HULTZ: My name is Dennis Hultz. I live in northwest Phoenix. My job title, I'm a driver for Emery Worldwide and Overnight Delivery Company. I've got 14 years education. Military service was U.S. Navy for six years. Never been selected for a jury.

THE COURT: I'm talking to the clerk here about our microphone. I was going to have somebody come up from downstairs to listen and find out why we're getting all the ball scores. And all of a sudden, as soon as I did that, it stopped. So it's a pretty smart machine.

Mr. Bollinger.

JUROR/BOLLINGER: My name is Joe Bollinger. I live in Phoenix. I own and operate B&B Pest Control. My wife is a housewife. We both have a high school education and one year of college. I have no military experience and no jury duty.

THE COURT: Thank you. Mr. Conn.

JUROR/CONN: My name is Richard Conn. I live in south Scottsdale. I work for Paramont Pools in the research and development department, and also part owner of a small machine shop. High school education with about half a year of college. No military service and no jury duty.

THE COURT: All right, thank you. Ms. Chmielewski.

[27] JUROR/CHMIELEWSKI: My name is Sue Chmielewski. I work for the State of Arizona, fleet management division. I manage the auto parts warehouse. I've had 14 years of education, no military service.

And I served on two juries. One was an auto accident. The other one was burglary, and they were both guilty.

THE COURT: All right. And you live in Phoenix?

JUROR/CHMIELEWSKI: Phoenix.

THE COURT: All right, thank you. All right. Mr. Finck.

JUROR/FINCK: My name is Darvin Finck. I live in Deer Valley. I am a facility's manager for a pharmaceutical manufacturing and distribution company here in Phoenix. My wife is self-employed. She has a cleaning service. We both have a few years of college, year-and-a-half to two years. No military service and no prior jury duty.

THE COURT: Thank you.

JUROR/SIMMONDS: My name is Mary Simmonds. I live near the town of Maricopa in Pinal County. I am a mother and a homemaker. My husband is a pressman in Phoenix here. I have had—I completed high school and have some community college courses. My husband had two years of high school, I believe. Neither one of us has had military service, and I have not had any prior jury duty.

[28] THE COURT: All right, thank you.

JUROR/WELTER: My name is Martin Welter. I live in Ahwatukee. I'm a full-time mental health therapist at Samaritan Behavioral Health. I also teach exercise and fitness at two community colleges. I have a master's degree. I have not served. I'm single. I have not served in the military and no prior jury.

THE COURT: Thank you.

JUROR/KEIL-ANGELO: My name is Kimberly Keil-Angelo. I live in Phoenix. I am a data center

supervisor. My husband is a federal probation officer. We're currently separated. I have a few years of college, no specific degree. My husband's working on his masters. No military service, and no prior jury duty.

THE COURT: Your husband is Dean Angelo?

JUROR/KEIL-ANGELO: Yes, he is.

THE COURT: All right, thank you. All right, going on.

JUROR/HANSERD: I'm Etoy Hanserd and I'm scared.

THE COURT: You're scared? Come on. You won the lottery.

JUROR/HANSERD: I live in Mesa. And my job is lab assistant at—

THE COURT: Pardon? You have to hold the microphone up.

[29] JUROR/HANSERD: I work as a lab assistant. I have a high school education and phlebotomy from Phoenix College. I have no military, and I've never served on a jury.

THE COURT: Thank you very much. Ms. Pelander.

JUROR/PELANDER: My name is Chris Pelander. I live in Chandler, Arizona. I am a homemaker. My husband is a programmer analyst for Arizona Public

Service. I've got some community college classes, high school diploma. Husband has three years of college. Neither one has military service. And I've been called for jury duty but not selected.

THE COURT: Mr. Gilbert.

JUROR/GILBERT: My name is Don Gilbert. I live in Phoenix. I'm a manager in Information Systems Division, a company here in Scottsdale. I manage a group of programmers. My wife's a realtor. We both have master's degrees. We don't have any military service.

I've been called on jury duty a couple of times. I was selected on a DWI case, but ended up being the alternate. So I don't know how it came out.

THE COURT: All right, thank you. Going on then.

JUROR/RILEY: My name is Arnold K. Riley. My wife and I are both retired. We own a construction company. We both have a high school education. No military service, no prior jury duty.

THE COURT: What community do you live in?

[30] JUROR/RILEY: What community?

THE COURT: Uh-huh.

JUROR/RILEY: Back in Indiana?

THE COURT: Here in Phoenix, where around here?

JUROR/RILEY: Oh, you mean Scottsdale. Didn't I say that?

THE COURT: I didn't really mean that, but that's fine. Thank you, Ms. Ball.

JUROR/BALL: My name is Julie Ball. I live in north Phoenix, and I work for a fragrance company in the warehouse. I have about two years in a community college, three years at a trade school. And no military service or prior jury duty.

THE COURT: Thank you. Mr. Allen.

JUROR/ALLEN: My name is Jim Allen, and I'm an alcoholic—no. I'm sorry, wrong place. My name is Jim Allen. I live in north Scottsdale. I'm a custom home builder. And my wife owns a lady's clothing store in Scottsdale. I've got two years of college, plus high school. I served in the Navy for two years, and I've never served on a jury.

THE COURT: Thank you, sir. Mr. Olivas.

JUROR/OLIVAS: My name is Francisco Olivas, truckload supervisor. I live in south Phoenix. GED; my wife eighth grade graduation. I've never served in the military, [31] never been on a jury.

THE COURT: All right, thank you. Mr. Bingham.

JUROR/BINGHAM: My name is Darryl Bingham. I live in northeast Phoenix. I'm QC director for Ms. Karen's. My wife is a retired teacher. I have a bachelor's degree in management, my wife as well. We have no prior military service, and no prior jury duty.

JUROR/MORLAN: My name is Doris Morlan. I live in Phoenix, Arizona. I'm a personnel assistant for the U.S. Bureau of Land Management. My spouse is a welder. I have 14 years of education. My husband is a high school graduate. I've served four years in the Air Force, rank of E-4. My spouse doesn't have any military service.

I served on a jury in superior court. It was an auto theft case, and the verdict was guilty.

THE COURT: Thank you.

JUROR/FAN: My name is Shuhui Cheng Fan. I live in northeast Phoenix. I'm a LAN systems specialist. My duty is just for computer work station. However, I'm on call all the time. My husband is a computer engineer, as well. He's self-employed right now. I have Master's degree in computer science and economics. My husband has Ph.D. in electronic engineering. I have no military services. I believe my husband had two years military services in Taiwan. I've been called for jury duty and select once, but the trial was [32] canceled.

THE COURT: Thank you. Mr. Schlueter.

JUROR/SCHLUETER: My name is Cliff Schlueter. I live in northeast Phoenix. I'm a civil engineer with

the Bureau of Reclamation. My wife is a contract manager for Honeywell. I've got a bachelor of science in civil engineering and about 12 credits post-graduate. My wife has a bachelor of arts, masters and everything but dissertation in French and a masters in international management.

I was in the United States Air Force for eight-and-a-half years, separated with a rank of staff sergeant or E-5. My wife has no military service.

I was impaneled on a grand jury in Hinneman County, Minnesota about five—seven years ago. And I was called once on the jury pool here for superior court, but that's all.

THE COURT: All right, thank you. Mr. Smith.

JUROR/JEFF SMITH: My name is Jeff Smith. I live in Chandler. Self-employed roofing contractor. Wife works at Intel. Education, about twelfth grade. No military. Prior jury duty was Chandler, alternate. So I don't know what happened.

THE COURT: All right, thank you. Ms. Wineman.

JUROR/WINEMAN: My name is Cindy Wineman. I live in Fountain Hills. I work for the Fountain Hills School [33] District in special education and also the Touchstone After School Program. My husband works for Tech Poulson in Scottsdale. We're both high school graduates with some college. No military service. I served on a jury in the late seventies involving a county

snow plow hitting a car. We found the county not at fault.

THE COURT: Thank you. Ms. Collins.

JUROR/COLLINS: My name is Jeannie Collins. I live in Glendale, Arizona. I work at Maryvale Samaritan Hospital as a materials management coordinator for the computers. I oversee the patient charges and the system purchasing and distribution of hospital supplies. My husband is laid off right now. I've never been in the military service, but he was in the Navy. I've never been on jury duty.

THE COURT: Thank you. Ms. Lindsey.

JUROR/LINDSEY: I'm Georgia Lindsey. I live in Ahwatukee. I'm an RN. I have a master's degree in health administration. My husband works for TWA, regional sales manager, bachelor's degree. No military service for either of us. One prior jury duty. I was an alternate. It was a DWI, and I don't know what happened.

THE COURT: All right, thank you. Ms. Baker.

JUROR/BONNIE BAKER: My name is Bonnie Baker. I live in Tempe, Arizona. I work in a medical office, front office. My husband is a broadcast engineer. I have one year [34] community college. My husband has two years community college. I was not in the military. My husband was in the Navy, E-5 for four years. And I have no prior jury duty.

THE COURT: Thank you. Mr. Velez.

JUROR/VELEZ: My name is John Velez. I live in Chandler. I am retired from Allied Signal. My wife works for the Chandler School District. She's a food purchaser for the whole district. I have three years of trade school and some college. I was in the Air Force for four years with the rank of airman second class in those days. My wife does not have any military service.

Two years ago I served as a juror on an automobile accident in an insurance case, and the guy was found not guilty.

THE COURT: All right, thank you.

All right. Well, we've survived the microphone, and that's—that part of our process. Let me just say a few other things about our proceeding today and just generally about being a juror and a juror here in federal court.

Why we get you all here, as many of you as we do, and why we ask you questions and tell you something about the trial is really to select people who can serve on the jury who can be fair and impartial, who do not have something about their background, or their experiences, or their [35] family, their work activities that would give them some opinion one way or the other about the case that we're going to be hearing and that the jury will decide.

And I do not ask or expect people to tell us about their bumper stickers, or what they may have on their bumper stickers, or what magazines they read, or what television programs they watch, things like that. We

try to get some information about you, and we try to give you some information.

The most important thing about our process is to understand how important it is to get people who can be fair and impartial. If you don't have that, you cannot have an effective, fair trial, whether it's a civil case or a criminal case. And in the final analysis, each of you know about yourself more than I will ever learn or that parties will ever learn during the time that we spend together in this process.

So if there's something about the case or about the parties, or about anything at all involving the case that you think wouldn't—you wouldn't just be comfortable with, you wouldn't—you'd like to be a juror in some other case, tell us, because that's what's important about it. For our purposes today there's nothing wrong about having an opinion about anything, or having some prejudice against anyone for race, religion, language, anything like that. That's not of our [36] interest today. The interest that we have is to know that. And so keep that in mind.

The other thing about our system, I've decided in the last year or so to try to use a questionnaire more to get some information about the jurors. The questions that are asked on the questionnaire are I think of a personal nature, things that you shouldn't ordinarily have to share with strangers about yourself, or your family or those sort of things. And the questionnaires work out pretty well. They really do. We used to have to have the people come up by the bench, and we'd try to talk to them here in the courtroom, and it just wasn't a good system.

We're not here to embarrass any of you or to get information that isn't necessary for our purposes. If any of the questions that we ask you, you wouldn't want to answer here in the presence of all of these other folks, just hold up your hand. We can do it up by the bench or later on if we talk to people individually in the jury room. So keep that in mind.

One other thing about the questionnaires that we have you fill out. Once the jury is selected in the case, we collect all the questionnaires and we shred them so that they don't stay in the court file, and they don't have a life of their own, and some other people don't have an opportunity to look at them sometime if they'd have an interest otherwise. [37] So we pick them up and shred them. We finally got a shredder. I think there's one on every floor now, and so we're able to do that. So that's how we do that as well.

Coming to court is a different process than most of you have in your life. And someone say, "Gee, I'm scared," and that's kind of a natural reaction. It's a different environment. I confess. I've been a lawyer for many years and a judge for 13 or so. And every time I come in a courtroom, and particularly to start a trial, I'm nervous. It's a different experience. It's not like it is on television, how it operates and what happens in a courtroom. So there's nothing wrong with being—or scared about it. Just listen carefully now, as if you serve as a juror. That's the important thing the jurors do. And we'll talk more about how important jurors are as we go through the process.

It's 10:20. The other thing we do, we take a recess once in a while, as I said, and everyone we ask to come back and be seated where you are. And so we're going to take the recess. You don't know anything about our trial, but I would ask you as well not to share your experiences about serving on other juries or anything like that during this process. And we'll tell you more about not doing that as well as you stay with us.

But in any event, we'll take a recess and we'll [38] take it until a quarter of 11:00. Look at the clock on the wall and see how that fits in with your schedule. And then we'll come back. And during the process we'll distribute the questionnaires. And at some time we're going to I'm sure have a number of you come in individually. We'll go in and set up in the jury room so that we can have you come in individually and give us some additional information about that.

But there are other things that I'll ask all of you and that we will want to get some more information about. And we need to tell you about our trial. So we'll do that when we get back together. So remember now, quarter of 11:00, and come back and we'll go ahead at that time. Sixth floor, remember.

(Recess from 10:27 a.m. to 10:55 a.m.)

THE COURT: Be seated. All right. Let me tell you just a little bit about our trial now and about—something about a criminal proceeding in federal court. A criminal case in federal court starts by what is called an indictment. And the purpose of an indictment is to commence the criminal case, and to tell a defendant or

defendants what the charges are that are brought against them.

The fact that an indictment has been issued in this case is not any evidence that a crime has been committed, and you're not to draw any inferences from the fact that these [39] defendants have been indicted. There are two defendants in this case on trial before you, and each of them have pleaded not guilty to the charges that have been brought against them.

Accordingly, the Government in this case, as it has in every other case, has the burden of proving the charge against each defendant as to each charge beyond a reasonable doubt. This burden never shifts from the Government and it remains on the Government throughout the entire trial. A defendant does not have to prove that they are innocent. A defendant has no burden of proof to sustain, and is under no obligations to produce any witnesses or any evidence.

Here each of the defendants is presumed to be innocent of the charges against them in the indictment, and this presumption of innocence exists now at the start of the trial, and continues throughout the trial, and is overcome only if and when all 12 members of the jury would unanimously conclude and find that the Government had sustained its burden of proving a charge against a defendant beyond a reasonable doubt.

Another thing about a criminal trial to keep in mind, is that a defendant in a criminal case is under no obligation, has no responsibility, no duty, obligation or however you characterize it, to testify in a trial. I never know whether a defendant will or will not testify.

That is [40] simply a non-issue. Juries are told not to consider whether a defendant does not testify. And so again that's how the system functions, and how it's functioned for more than 200 years.

Now, that's really a very broad overview of a criminal trial in federal court and how it starts. Any of you have any disagreement for whatever reason with any of those propositions? Okay.

Let me say one other thing about a trial, the responsibilities of the jury and my responsibilities as a judge. My function is to preside at the trial, keep things moving along, rule on questions of law that come up during the trial. And at the end of the trial, provide the jury instructions about what the law is that they're to follow, what the elements of the charges are and what the Government's burden is in proving those charges, and how to—or some things at least—to consider in evaluating the testimony of witnesses or evidence. That's my responsibility. I cannot decide whether a defendant is guilty or not guilty. I can't do that.

The jury's function is to listen to the evidence, observe the witnesses as they testify, decide what happened, consider the instructions that are given by the Court, and arrive at a verdict, guilty or not guilty. That's the jury's function.

[41] I think it would be obvious that all of the jurors have to hear the same evidence, have to look at the same witnesses as they testify, see the same exhibits that they all look at in order to determine what happened. It's perfectly obvious to me that you couldn't very well have a trial if some jurors only listen to part

of the evidence and other jurors didn't. Similarly, it's—and jurors take an oath to do it, to follow the law that's given them by the judge and all apply that same law.

And it seems obvious to me as well that you couldn't very well have an effective system of justice if each juror or a group of jurors could decide independently what the law was and act accordingly. You couldn't— I guess I wouldn't be comfortable in that kind of a system, and I don't think anyone else would be. So that's another thing that jurors do. They agree to follow the law that's given them by the Court.

Some people may have different opinions about that. If they do, they can go to Congress or call a newspaper and talk to whoever they want to. But when they come to court, they follow the law that's given to them by the judge, if they follow their oath. Some people may have different opinions about the law or about that, but if you do, this is the time to tell us about it, because we need to know that. Because when the jury goes in to deliberate, they all hear [42] the same law and they all hear the same facts. That's how our system operates. So any of you, for whatever reason, have any disagreement with those propositions?

Do any of you, or any members of your family or friends, belong to any organization or group that interest themselves in court watching; what courts are doing; how they're operating; whether they're doing what people think they should be doing?

Any of you, or any members of your family or close friends belong to any group or organization that ac-

tively protests the right of the United States Government to collect income taxes, for whatever reason?

In this case, I'm sure you've observed that we have people here acting as interpreters for the defendants. The defendants are Spanish-speaking people, I believe the record will show or you'll be told. And so we have interpreters here for that purpose. It happens whenever there's a need for that. We have here Spanish being interpreted. But over the course of a year, we may have many other languages necessary to use an interpreter for. Many of our cases involve Native Americans. So we have people come and interpret in Navajo or Hopi or languages there, as well as other languages, German or whatever may be needed.

Okay. Anything about the fact that we're having—the defendants you will find have Spanish names, surnames and speak [43] Spanish, and we have to have an interpreter—anything about that circumstance that would affect any of you in arriving at a verdict in deciding what happened or what didn't happen?

Again, you see, that's just a circumstance that they bring with them. But other than that, it really isn't an issue as to what happened or what didn't happen. They aren't on trial here for speaking Spanish. So again—but if someone has the opinion that you should—if you get—come to court you ought to be able to speak English, we ought to know that, because again, you see, that's something that would be collateral to any of the issues that we have here.

The charges in this case are included in an indictment, and there are three counts in the indictment, and

each of the defendants are charged in each count. There are two defendants. Conspiracy—Count 1 is conspiracy to possess with intent to distribute heroin, a controlled substance. Count 2 is possession with intent to distribute heroin. And Count 3 is a firearm being there during and in relation to a drug-trafficking crime. Each one of those charge a federal crime under a federal statute.

The events are alleged to have occurred some time between July 22nd, 1993 through July 27th, 1993 here in the District of Arizona. And that's just another way for our purposes of saying the State of Arizona. And so those are [44] the charges against them.

Now, you perhaps had a sense in filling out the questionnaire that a drug charge may be involved in the case because of the questions we asked.

Now, with respect to the information that I've given you about the trial, and without being aware at this time of everything that was said in your—in answer to the questionnaires which we will look at, anything about the case itself now, based on the information that I've given to you, that would cause any of you to believe that for whatever reason you simply would not want to serve as a juror here, or don't think that you could serve fairly and impartially as a juror in this case, given the nature of the charges or the parties, anything like that? Any of you have that opinion? All right.

Perhaps this would be a good time to meet the parties. Mr. Kirby, would you introduce yourself and anyone with you?

MR. KIRBY: Thank you, Your Honor. Ladies and gentlemen, my name is Vincent Kirby. I'm an assistant United States attorney with the Department of Justice, and seated with me is Agent—Special Agent Ray Bentley of the Drug Enforcement Administration.

THE COURT: All right. Any of you know Mr. Kirby or the gentleman with him, or anyone in any of those agencies [45] that were mentioned? All right. Again, if you should know that, or know anyone like that, why please tell us.

You may recall just generally from the newspaper that we have a new recently appointed U.S. attorney in the state of Arizona, Janet Napaletano. And she was recently confirmed by the United States Senate, and so she's our new U.S. attorney. And if you know anything about Ms. Napaletano, or have any ideas or opinions about her being the U.S. attorney?

All right. Mr. Garcia, if you would introduce yourself and your client, please.

MR. GARCIA: Good morning, ladies and gentlemen. My name is Bernardo Garcia. I represent one of the co-defendants, Mr.—

THE COURT: Keep your voice up, please.

MR. GARCIA: —Mr. Abel Martinez-Salazar.

THE COURT: All right. Any of you know Mr. Garcia or his client in any way? All right. Thank you very much.

Mr. Bartolomei, if you'd introduce yourself and your client, please.

MR. BARTOLOMEI: Yes, Your Honor. Thank you. Morning, ladies and gentlemen. My name's Gregory Bartolomei. I'm partner in the firm of Bartolomei & Victor, and I represent Celso Organista-Dorantes to my right.

THE COURT: All right. Any of you know [46] Mr. Bartolomei or Mr. Organista-Dorantes? All right, thank you.

Any of you believe you've heard anything at all about this case or anything that might be involved in it, any of the events?

How many on the jury speak Spanish? I see one, two. All right. Well, we usually have more than that. But let me just say again that people who speak Spanish, we have—as it may become necessary during the trial, we have an interpreter, certified interpreters who interpret for us here in court. And so to the people that speak Spanish or understand some Spanish that would serve on the jury, they have to agree or accept the interpretation, translation that's being done by the interpreter, so that everyone again would be hearing the same thing in the same fashion.

The parties, to the extent they object to any testimony that's being given or the translation of course, then we discuss that and try and resolve it. Anyone who speaks Spanish have any difficulty following that admonition?

Do any of you on the jury—and let me say that the juries do not decide punishment for a crime. A judge does that after the trial, if there's a verdict of guilty—a judge does that. But do any of you on the jury—would have any reluctance or reservations about arriving at a decision that perhaps could impact on someone's liberty [47] interests, that they might have to serve some time in prison as a result of your verdict? Anyone, for whatever reason, religious, philosophical or otherwise simply would not want to have that responsibility, and feel you couldn't do it fairly?

Does anyone on the jury know anyone else on the jury just by where you work or anything like that? Yes, sir, your name, please.

JUROR/DUNST: Robert Dunst. There's a lady, she and I work together, not at the same location. Actually she works for me.

THE COURT: Okay. And her name here?

JUROR/DUNST: She just started.

JUROR/WINEMAN: Cindy Wineman.

THE COURT: All right, thank you.

JUROR/WINEMAN: We just met this morning.

THE COURT: All right. Anything about those associations do you think that would affect you one way or the other, either one of you, to bond together in some way? Okay.

One other thing that you—a couple of other things that you have in common that brings you here, we draw our jury panels from registered voters. The county uses driver's license and perhaps something else. I don't know. But where we get our jurors is from registered voters. So [48] you all should be or have been at the current date registered voters. You're all citizens of the United States, and you come from counties which would include Pinal County, Gila County. We recently acquired Gila County from Tucson because of the number of people that live in northern Gila County, and that it's easier, shorter distance to come to Phoenix from the Payson area than to go to Tucson. Maricopa County obviously, Yuma County and La Paz County. So that's where we get our jurors from.

Any of you been here before in the last few weeks to come to court for a possible trial? Well, it's nice to talk to people that haven't come several times in the same month, because you get the experience of hearing it all one time at least up till now.

Our jury system is that people are on our jury panel for a month or one trial. If you sit on a case, then you're excused and you don't come back. Otherwise, you could come back more than once during a month. And of course Christmas, it's hard to say what's going to happen during the Christmas holidays, but I picked a jury last week, and I'll pick a jury this week, and I'll pick a jury next week. So that's how life goes when you're here in the building. Sometimes we don't do it that often, but that's kind of what happens.

As we went through this process this morning and [49] you gave us the information on the pieces of paper

that you had, you told us about yourself and about your family, or at least your spouse, what you did, things you've done.

Let me go back in a sense to that, and some of you told us about—or told us where you work. There were people who worked for—or their spouse for the Bureau of Land Management or for a federal or state agencies, things like that. But to the extent—if you've already given us the information, it's not necessary to do it again.

But if it hasn't been told to us, starting again in the jury box, what we want to inquire of you is whether you or any members of your family now or in the past have worked for some federal agency, a state agency or local government. And if so, when and in what capacity? And in that process, without limiting it to law enforcement agencies, to keep law enforcement related agencies particularly in mind.

And this would include organizations at the federal level, such as the Federal Bureau of Investigation, the Drug Enforcement Agency, Border Patrol, Customs, Postal Service inspectors, Internal Revenue Service, federal correctional officers, U.S. marshals, any of those kind of organizations or activities. And at the state level, particularly the Highway Patrol, the Department of Public Safety, if there are any auxiliaries, belonging to auxiliaries like that. Also people who would work in a state correctional facility—a [50] prison, any sort correctional facility like that at the state level. And then also at the city—city police departments, county, county deputy sheriffs, in that organization, or the county correctional facilities, the jail.

So what we're asking you about particularly is those kind of activities, as well as anyone, wherever they might work, in a federal agency or state or local government. So again starting in the back row, if you've already told us, you don't have to hold up your hand and tell us anymore, but if there's any additional information that you would give to us about yourself or your family members, brothers, sisters, children, like that, why just hold up your hand, and tell us who it might be and what they do. So starting in the back row, anyone there with additional information? Mr. Kelly.

JUROR/KELLY: My younger brother is a former member of the Scottsdale Police Department and is currently the chief of security for America West Airlines corporate security.

THE COURT: All right. When was he—how long was he with the Scottsdale PD?

JUROR/KELLY: He was with Scottsdale Police Department less than six months there five years ago.

THE COURT: All right, thank you. And going on across in the back row, anyone else?

[51] JUROR/JOHANN: I have a son-in-law that's with the DPS. He's a white-collar crime detective.

THE COURT: And your name, please?

JUROR/JOHANN: His name?

THE COURT: Your name.

JUROR/JOHANN: Robert Johann.

THE COURT: Remember, you all have to give us your name every time. That's the reason, so that the—we have today what's called an electronic court reporter. Ordinarily we have a court reporter who takes everything down stenographically. But now we have an electronic court reporter who's sitting in front of me, and so we—in order to have complete record we need your names as we go.

All right. So he's a DPS officer.

JUROR/JOHANN: Yes.

THE COURT: How long has he done that?

JUROR/JOHANN: Five years.

THE COURT: And he doesn't—not in uniform now at least.

JUROR/JOHANN: No, he's a detective.

THE COURT: Okay, thank you. All right. Going on, anyone else in the back row? Just hold up your hand. Front row, anyone in the front row, any additional information about those things? All right. The row in front of me, anyone in the row in from of me? Remember, again now working [52] for a federal, state or local government in some capacity that you haven't told us about.

JUROR/HULTZ: Yeah. My name is Dennis Hultz. Probably about seven years ago I worked in the county jail in Phoenix in a work-release program driving a bus to and from the Maricopa County Skills Center. And I was released from there just because I didn't get along with the supervisor. And—

THE COURT: Were you a correctional officer?

JUROR/HULTZ: No, I was just a civilian employee just driving the bus and—

THE COURT: Okay, uh-huh.

JUROR/HULTZ: —taking the inmates to and from the skill center.

THE COURT: Okay.

JUROR/HULTZ: My brother was in law enforcement and drug enforcement in Idaho back when I was really young growing up. I was probably about 14, 15. And that was about 20 some years ago, 30 years ago.

THE COURT: All right. Anything about that experience or his experiences you think that would affect your ability to listen and decide here?

JUROR/HULTZ: No.

THE COURT: All right, thank you. Anyone else in the front row?

[53] JUROR/BOLLINGER: My name is Joe Bollinger. I have a brother or had a brother that was a

policeman for Clovis, New Mexico for about 20 years. And I had a cousin that worked for the Highway Patrol in New Mexico for 20 years.

THE COURT: All right, thank you. Anyone else in the front row? Anyone in the second row.

JUROR/SIMMONDS: Mary Simmonds. I have a sister-in-law who's a Mesa police officer, and I don't know exactly what she does. I think she drives a patrol car.

THE COURT: All right. I take if from what you say that you don't follow along that closely her activities.

JUROR/SIMMONDS: We meet once a year during the holidays.

THE COURT: All right, thank you. Anyone else in that row?

JUROR/ALLEN: My name is Jim Allen, and my brother-in-law is with the Security & Exchange Commission. And he's an attorney, and he does investigating and depositions.

THE COURT: All right. Thank you very much. Anyone else in that row? Anyone in the back row?

JUROR/WINEMAN: My name is Cindy Wineman. I have a sister in Michigan. She's a 911 dispatch for the Michigan State Police.

THE COURT: All right, thank you.

[54] JUROR/JEFFREY SMITH: I've got a cousin that's a police officer in Tempe, Arizona.

THE COURT: And you're Jeffrey Smith?

JUROR/JEFFREY SMITH: Yes, Jeffrey Smith.

THE COURT: Right. And tell me again.

JUROR/JEFFREY SMITH: He's a police officer in Tempe.

THE COURT: Uniformed officer?

JUROR/JEFFREY SMITH: Yes, sir.

THE COURT: And he's what, a brother-in-law?

JUROR/JEFFREY SMITH: No, he's a cousin.

THE COURT: Cousin. All right, thank you. Anyone else? Okay.

We know that Mr. Sundeen is a lawyer, and he's appeared before me. So I know that as well. Anyone else on the—and someone mentioned having—that their wife was a paralegal with a law firm. In the meantime, have you remembered what firm that might be?

JUROR/JOHNSON: Weyl, Guyer, MacBan and Olson.

THE COURT: Pardon?

JUROR/JOHNSON: Weyl, Guyer, MacBan and Olson.

THE COURT: All right. Anyone else besides those folks that have had—apart from training that you would have had or a program course that you would have had in high school or college about business law or something like that [55] any others of you that have studied law or gone to law school, anything like that? Yes, ma'am.

JUROR/GORDON: My name is Cindy Gordon. Are you just asking if we studied law. Yes, I did about four years ago when I was trying to become a paralegal.

THE COURT: So you took a paralegal program?

JUROR/GORDON: Yes, I did.

THE COURT: All right, thank you. Anyone else?

During the trial it's quite likely, based upon the nature of the charges, that there will be witnesses who will testify who have some position with a law enforcement agency. And what I want to point out to you now and then ask about is that fact that the person that works for—or the fact that a person works for a law enforcement agency does not for that reason alone mean that that testimony is deserving of, for that reason, more or less consideration or greater or less weight than that of any other witness who may testify in the proceeding.

It is a fact or a circumstance that they bring with them, and it may be appropriate at some time for the

people to argue or infer in some way that they have some interest or bias in the case.

THE COURT: But again, simply because they work for a law enforcement agency doesn't mean, as I say, that their testimony should be accepted for that reason or rejected for [56] that reason. Any of you disagree with that proposition, and would have any difficulty following that as you heard the testimony of those folks?

Essentially everyone who comes to court, some of them may have things about their background or their circumstances that would affect their believability or credibility or could. Jurors are told to—how to consider that testimony, if it does come in. But again, everyone brings different backgrounds with them when they come to court. They're sworn to testify. And starting out they're all entitled to the same consideration, the same interest as anyone else, whatever their background may be.

Whatever is developed during the cross-examination, of course, then it's appropriate to consider that. But just to reject someone or accept one's testimony because of a status and nothing else would be simply wrong. Again that's not how our system operates.

Do any of you on the jury panel have any sort of problem, hearing problem, being comfortable in the courtroom setting as long—hour, hour-and-a-half at a time and being able to hear and be comfortable about that? Generally we have a pretty good hearing system here, but it isn't perfect.

The other thing that's kind of obvious about a trial or will become obvious, most people when they come to court—and too many lawyers—and I keep getting after the [57] lawyers particularly, don't speak up. And if you come to court and you can't be heard no matter why you're here, you might as well stay home. That's how simple that is.

But again recognizing that from time to time, we tell people—and witnesses come and they're nervous and they don't speak up. So we try to get them to. But in any event, any of you have any sort of problems that you think would cause you to have some difficulty or be uncomfortable as a juror? Ms. Gordon.

JUROR/GORDON: Yeah, I have MS. And when I sit for too long a period of time my legs become numb.

THE COURT: Would an hour or so at a time—that's generally about how long, an hour, hour-and-a-half max.

JUROR/GORDON: I should be all right, yeah.

THE COURT: Sure, yeah. We don't go longer than that. Okay.

All right. Now, where we are, any of you again—we're about to get the lawyers together and look at the questionnaires again. Any of you, for whatever reasons, think you simply would prefer to serve on some other jury, or not this jury, or not serve now? Any of you have those kinds of things that you want to tell us about, tell me about before we start looking at the questionnaires? Okay.

Well, what—it's 11:20. And so I want to talk to the lawyers. I'm going to ask you all to be back at 1:00. [58] And during that time I will talk to the lawyers about the questionnaires, see who we want to call in, and then at 1:00 we will start asking some of you to come in so that we can ask additional questions about the information on the questionnaires. We'll go through that. That'll go fairly quickly.

And then as soon as we get that done, there may be a few additional questions that the lawyers have in mind, but then we should be ready to make our selections. And so that should be certainly by 3:00 or something like that.

We should get everybody else about mid-afternoon or thereabouts to go about your business, and the rest of you—and those folks, then, wouldn't have to come back. And so that's what we're trying to do. So keep that in mind again now that you know little bit more about the case.

Don't talk about it. Don't share experiences that you may have had, friends or family or otherwise with any sort of things that may relate to something we're interested in here, and just don't do that, and come back.

And when you come back at 1:00, again—pardon me—remember where you're seated. Be seated there and then we'll start calling the folks in. The rest of you, we'll just ask you to sit here, and you can read or do whatever you wish to while you wait patiently till we get through that part of the process.

[59] So we'll take our noon recess now a little early so we can start on this other inquiry. We'll, I'll excuse you now while I talk to the lawyers about who they want to get in. So see you at 1:00

(Jury Panel Out at 11:26 a.m.)

THE COURT: All right. Just be seated, please.

All right. What about Mr. Sundeen, juror number four? He's the lawyer who said he had a case Monday? Your thoughts about excusing him? Any objections one way or the other on that?

MR. KIRBY: I have no objection.

MR. GARCIA: No objection, Your Honor.

MR. BARTOLOMEI: None, Your Honor.

THE COURT: All right. Well, then when he comes back we'll excuse him.

And then the other one who wanted to perhaps be excused was Mr. Sink, juror number 14, who has a two-week vacation. I will keep him around at least and see what happens. We'll probably have enough jurors that we can accommodate him when we get that far.

All right. Now, you've got your questionnaires. Why don't we do this. Look through them, and let's get back together at 20 minutes of 1:00, and see which ones we want to call in individually, and then we'll start doing that when we get back together at 1:00. So let's get

together with the [60] lawyers at 20 minutes of 1:00 to decide who we want to call in, and we'll go ahead and get that done. Okay?

Anything else that we need to touch upon? And I'll look and see what questions were proposed, and you might think about any that we haven't touched upon now that we might want to ask everybody generally. Okay?

So see you at 20 minutes of 1:00.

(Recess from 11:29 a.m. to 2:02 p.m.)

(Jury Room Proceedings at 12:45 p.m.)

THE COURT: All right. Have you all had a chance now to look at the questionnaires?

MR. GARCIA: Yes, sir.

MR. KIRBY: Yes, sir.

THE COURT: All right. We'll just go through them alphabetically. And anyone that you want brought in, why tell me and we'll pull that one out.

The first one is Allen.

MR. KIRBY: I'd like to see Mr. Allen.

THE COURT: Baker, number 45; Merle Baker, number 17; Julie Ball, number 33; Darryl Bingham, number 36.

MR. GARCIA: Can we have one moment, Your Honor? We didn't realize we were going to go in alphabetical order.

THE COURT: Well, I've given you the numbers as we go, also. All right?

MR. GARCIA: Yes, Your Honor.

[61] THE COURT: Baker is number 45, Bonnie Baker.

MR. BARTOLOMEI: I have Velez as 44.

MALE VOICE: Yeah, 44 you mean, Your Honor.

THE COURT: Well, whatever, you got it? You want her?

MR. GARCIA: No.

THE COURT: Merle Baker, 17.

MR. GARCIA: No.

THE COURT: Julie Ball, 33.

MR. GARCIA: No, Your Honor.

THE COURT: Darryl Bingham, 36.

MR. BARTOLOMEI: Yes, Your Honor.

THE COURT: Joe Bollinger, 22.

MR. GARCIA: Yes, Your Honor.

THE COURT: Ms. Chmielewski, 24.

MR. KIRBY: Your Honor, she didn't fill out—unless I missed something, she didn't fill out the back side.

THE COURT: Want her to come in?

MR. KIRBY: Yes.

THE COURT: Jeannie Collins, 42.

MR. BARTOLOMEI: Yes.

THE COURT: What is there about Ms. Collins, something she said? "Oh, I agree with the laws."

MR. BARTOLOMEI: I wasn't sure how she meant it.

MR. GARCIA: Your Honor, there was also—I have [62] some—she had mentioned something about her spouse being disabled and recently unemployed. I was wondering if this was going to provide a financial hardship, and therefore, interfere with her.

THE COURT: She's been asked all those kinds of questions, and she hasn't volunteered any reason to be excused for that.

Conn, 23.

MR. KIRBY: I'd like to see Mr. Conn.

THE COURT: Dunst, 13.

MR. KIRBY: No.

THE COURT: Eckard, number 10.

MR. KIRBY: No.

THE COURT: Mr. Fan, number 38; Mr. Finck, number 25; Mr. Gilbert, number 31.

MR. GARCIA: I would like to see Mr. Gilbert, Your Honor.

THE COURT: Mr. Gilmore, number 16; Ms. Gordon, number five.

MR. KIRBY: I'd like to see her.

THE COURT: Ms. Hanserd, number 29.

MR. KIRBY: I'd like to see Ms. Hanserd.

THE COURT: Mr. Hultz, number 21; Mr. Johann, number three.

MR. GARCIA: I would like to see Mr. johann, Your [63] Honor, going to the relationship with his son while in DPS.

MR. BARTOLOMEI: I would too.

THE COURT: Mr. Johnson, number eight, Martin; Ms. Keil, number 28.

MR. GARCIA: I would like to see Ms. Keil for the same reason as Mr. Johnson.

THE COURT: She's got a son in DPS?

MR. GARCIA: No. She—

MR. BARTOLOMEI: Her spouse is a probation officer.

MR. GARCIA: Yes, her spouse is a probation officer.

THE COURT: I thought—

MR. GARCIA: Number—

THE COURT: — they were separated. Isn't that the same one? Yeah, they're separated, Dean Angelo. Okay. Mr. Kelly, number two; Mr.—Ms. Kolomitz, number 20; Mr. Lanford, number nine.

MR. KIRBY: I'd like to see Mr. Lanford.

THE COURT: Ms. Lindsey, number 43.

MR. KIRBY: Ms. Lindsey didn't do the back.

THE COURT: Mr. Mann, number one; Ms. Morlan, number 37.

MR. KIRBY: I'd like to see Ms. Morlan.

THE COURT: Thirty-five, Mr. Olivas; Ms. Pelander, number 30; Mr. Rendek, number seven; Mr. Riley, I had 32 [64] question mark. He's the only Riley I could find, but I had a different first name.

MR. KIRBY: Mr. Riley didn't fill out the back.

THE COURT: Ms. Schaller, number 19; Mr. Schlueter, number 39; Mr. Schotz, number 11; Mr. Schroeder, number 18; Ms. Simmonds, Simmonds, number 26; Mr. Sink, number 14; Jeffrey Smith, number 40; Mary Ellen Smith, number 15. Neal Sundeen we were going to excuse. Silvio Vaninetti.

MR. GARCIA: What number is that, Your Honor?

THE COURT: What—do you think we'll be able to get done Friday, at least get it to the jury?

MR. KIRBY: Get it to the jury definitely by Friday.

THE COURT: Reba Varela, number 12.

MR. GARCIA: I would like to see —

THE COURT: Mr. Velez, number 45; Mr. Welter, number 27; Ms. Wineman, number 41.

THE CLERK: She's a single parent, and to be away from work would be a hardship.

THE COURT: When did she say that?

THE CLERK: She came up to the bench on her break just before lunch.

THE COURT: What's her number?

THE CLERK: Her number is 20.

THE COURT: Apparently Ms. Kolomitz came up to the [65] clerk, and the clerk talked to Ms. Kolomitz. And Ms. Kolomitz said that she's a single parent and it might work a hardship or it could work a hardship to be here. So we'll ask her to come in and see about that, number 20, Kolomitz.

We also—we can talk about it later. We have the juror who teaches at the community college who inquired about being off, and we'll see how we're doing there.

All right. Well, we'll call these folks in, then. If there's any others that we need to call in, why we can bring some additional ones in and talk with them as well.

Going to check there, Bobby, and see if they're all here, and we can start in.

THE CLERK: We're missing two people.

THE COURT: Well, we can get started.

THE CLERK: Yes.

THE COURT: Sure. Okay, we'll get started. James C. Allen. Hi, Mr. Allen. Be seated, please.

JUROR/ALLEN: Okay.

THE COURT: On your questionnaire, you said your son smokes marijuana once in a while.

JUROR/ALLEN: Uh-huh.

THE COURT: About how old is he?

JUROR/ALLEN: Twenty-one. He's a college student.

THE COURT: Uh-huh. And then over on the back of [66] your questionnaire, you have an opinion, et cetera, and then you said, "personal." Is that something you wouldn't want to share with us? Is that what you're saying?

JUROR/ALLEN: No. It's just that kind of like the marijuana law is a little strict and that's the only thing about that.

THE COURT: Okay. Your son's use and so forth, do you think the fact that he does that would affect your ability to listen here and decide whether someone was or wasn't trying to sell heroin or any of the other issues we're going to have in the case?

JUROR/ALLEN: Not at all.

THE COURT: Okay. Mr. Kirby, any questions?

MR. KIRBY: No questions.

THE COURT: Mr. Bartolomei?

MR. BARTOLOMEI: None, Your Honor.

THE COURT: Mr. Garcia?

MR. GARCIA: Mr. Allen, what are your attitudes towards those individuals that sell the marijuana to your son?

JUROR/ALLEN: I've really never thought about it. It's recreational. I've really not thought about it.

MR. GARCIA: I have nothing further.

THE COURT: All right, thank you. If you'd just wait outside, Mr. Allen, we'll be going right along here.

[67] The next one is—what is, "friends, cocaine, mostly" — what's the next word?

MR. KIRBY: I was guessing recreational.

THE COURT: Okay. Well, in any event, Darryl Bingham, number 36. Hi, Mr. Bingham.

JUROR/BINGHAM: Hi.

THE COURT: You—we decided you're nothe best penman we've had. What is that word right there?

JUROR/BINGHAM: "Mostly recreational."

THE COURT: Okay. Well, that's what someone said. I wasn't sure. And then on five, "Guilty, guilt by

association." Could you just explain a little bit more about that?

JUROR/BINGHAM: Well, I might be speaking of my opinion, but anybody that's around drugs, usually there's some type of a guilt associated with it, in my opinion.

THE COURT: And you understand —

JUROR/BINGHAM: And if you're not guilty, then you shouldn't be anywhere around it.

THE COURT: You understand here that the question to be decided is whether or not the defendants were around it and/or were doing things under the instructions of the Court that were wrong. And for instance, juries are told that if someone is just standing around and happened to be in an area where something is happening, their mere presence—you [68] can't convict anyone simply for being present at a location. Would you follow that instruction?

JUROR/BINGHAM: I would follow that instruction.

THE COURT: Okay. Mr. Bartolomei, any questions?

MR. BARTOLOMEI: Would you be able to set aside your personal feelings in hearing this case?

JUROR/BINGHAM: I don't believe so.

MR. BARTOLOMEI: You don't believe you would.

JUROR/BINGHAM: I don't believe I would.

MR. BARTOLOMEI: Let me ask you this as well. Do you think—

THE COURT: You have to keep your voice up, also.

MR. BARTOLOMEI: I'm sorry, Your Honor.

Do you think that perhaps at home you might be—or at work you might be subject to some ridicule or scorn—

JUROR/BINGHAM: No.

MR. BARTOLOMEI: —or some harassment from that?

JUROR/BINGHAM: No.

MR. BARTOLOMEI: But you do feel—you have very strong feelings about this. Is that a yes?

JUROR/BINGHAM: Yes, yes.

MR. BARTOLOMEI: Nothing further, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: You feel that there could be guilt by association as to drugs; is that right?

[69] JUROR/BINGHAM: Uh-huh, that's correct.

MR. GARCIA: Do you feel that there could also be guilt by association as to a firearm involved in a drug transaction?

JUROR/BINGHAM: I'm sorry, I don't quite follow that.

MR. GARCIA: Well, let's assume that there's a drug transaction. Let's assume that there is a firearm involved in that drug transaction.

JUROR/BINGHAM: Okay.

MR. GARCIA: Would the person who would be involved in the drug transaction by association also be involved with the —

JUROR/BINGHAM: I believe so, I believe so.

MR. GARCIA: Thank you. I have nothing further, Your Honor.

THE COURT: Mr. Kirby.

MR. KIRBY: Just so I'm clear, Mr. Bollinger (sic), I know you have strong opinions. But what you're saying is that even though the Judge would instruct you in certain fashions that just being around it may not be enough to convict someone, would you be able to follow what the judge tells you to do despite your opinions?

JUROR/BINGHAM: I don't believe so.

MR. KIRBY: Nothing further, Your Honor.

[70] THE COURT: All right, thank you. Then if you'd just wait outside.

All right. Our next one is Joe Bollinger, number 22.

MR. KIRBY: We did him.

THE COURT: Why did we have him? Someone wanted him?

MR. KIRBY: We just did him.

THE COURT: Oh. That wasn't Bollinger, was it? That was Mr. Bingham.

MR. KIRBY: I'm sorry.

MR. BARTOLOMEI: That was Bingham.

THE COURT: Bollinger, did we want Bollinger? Pardon me.

MR. BARTOLOMEI: Yes. There was—I had one question for him.

THE COURT: All right. Let's ask Mr. Bollinger to come in.

All right. Mr. Bollinger, be seated. Sounded to me like you grew up in New Mexico.

JUROR/BOLLINGER: That's right.

THE COURT: How'd you ever escape that nice state and come over here?

JUROR/BOLLINGER: Oh, I had an opportunity to come over to go to work. So I just thought I'd try it.

[71] THE COURT: How long you been here?

JUROR/BOLLINGER: I moved to Arizona in '66.

THE COURT: Issue still in doubt?

MR. BARTOLOMEI: Yes, Your Honor, if I may.

Mr. Bollinger, I'm sorry. I wasn't very clear. You indicated that your brother was a New Mexico cop.

JUROR/BOLLINGER: Yes. He was a city policeman in Clovis for about 15 years, but he hasn't been doing that for the last 20 years.

MR. BARTOLOMEI: Oh, so he's retired?

JUROR/BOLLINGER: Yes.

MR. BARTOLOMEI: I was wondering whether he had been hurt in the line of duty or anything like that.

JUROR/BOLLINGER: No.

MR. BARTOLOMEI: Did you discuss criminal cases with him at all on a regular basis?

JUROR/BOLLINGER: No.

MR. BARTOLOMEI: I have nothing further, Your Honor.

THE COURT: Anyone else?

MALE VOICE: No.

THE COURT: All right. If you'll just wait outside, thank you very much, sir.

All right. Our next one is Susan Chmielewski, number 24. Sit down, Ms. Chmielewski.

[72] JUROR/CHMIELEWSKI: Okay.

THE COURT: You didn't fill out the back of your questionnaire.

JUROR/CHMIELEWSKI: Oh, you know I didn't know there was a back to it.

THE COURT: Well, that's the reason we put "over" down.

JUROR/CHMIELEWSKI: Oh, well, you know.

THE COURT: But in any event, just take your time and go through it.

JUROR/CHMIELEWSKI: Okay.

THE COURT: All right.

JUROR/CHMIELEWSKI: Okay.

THE COURT: Uh-huh, thank you. All right. Question number five, for those interested, "yes, should be —"

JUROR/CHMIELEWSKI: Re-examined.

THE COURT: "—reexamined," six, no; seven, no; eight, no.

Mr. Garcia.

MR. GARCIA: I have no questions.

MR. BARTOLOMEI: No questions.

THE COURT: Mr. Bartolomei? Mr. Kirby.

MR. KIRBY: I just wasn't clear, Your Honor. Is the answer to number five "reexamine"?

[73] THE COURT: "Yes, should be reexamined."

MR. KIRBY: If I might, Ms. Chmielewski, could you explain what you mean by that?

JUROR/CHMIELEWSKI: Well, I think the law has to look at the drug problem as we know it now. We've got penalties for, you know, a little bit of possession and penalties for a large possession or whatever, and I think we have to reexamine that much like we did with alcohol years ago. You know, a little bit can end up being a whole lot later on. I think the laws should be the same for whatever quantities or whatever part you're playing in the drug problem.

MR. KIRBY: Would that cause you any difficulties in sitting and assessing a case, listening to the evidence, following the laws given by the judge?

JUROR/CHMIELEWSKI: Not necessarily, because the law stands as it is now, and we're bound by that law until those laws are changed.

MR. KIRBY: Nothing further, Your Honor. Thank you.

THE COURT: All right. Thank you very much. If you'll just wait outside a few more minutes.

Our next one is Jeannie Collins, number 42. Hi, Ms. Collins. Be seated, please.

Mr. Bartolomei, any questions?

[74] MR. BARTOLOMEI: Yes, Your Honor, just one.

Ms. Collins, could you please explain what you mean by your answer number five, you agree with the laws? Can you elaborate on that a little bit?

JUROR/COLLINS: I really wasn't sure. Just the laws that are made, they are there for a reason. I really don't have a big opinion. It just—I mean I didn't know what to write on there. The laws are made for a reason, and that's why we're to abide by them.

MR. BARTOLOMEI: I understand. Thank you.

THE COURT: All right. Anyone else?

MR. KIRBY: No, Your Honor.

THE COURT: All right. Mr. Garcia.

MR. GARCIA: You had mentioned earlier that your husband was recently unemployed. Is that—

JUROR/COLLINS: Uh-huh.

MR. GARCIA: Would that situation cause you some financial burden such that it would interfere with your ability to concentrate on the trial?

JUROR/COLLINS: No.

THE COURT: All right. Thank you very much. Wait outside for just a few more minutes.

Our next one is Richard Conn. Him, Mr. Conn.

JUROR/CONN: Hi.

THE COURT: Mr. Garcia, any questions?

[75] MR. GARCIA: No questions, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: None from me, Your Honor.

THE COURT: Mr. Kirby.

MR. KIRBY: Thank you, Your Honor.

I just wanted to clarify, Mr. Conn, question number five, about law enforcement practices being directed at the wrong people. Could you explain what you mean by that?

JUROR/CONN: I think more of—it would be—we would be better served to combat the drug problem by attacking more of the higher-ups and prosecuting those type of people versus the end-users. I think a lot of times some of it's misdirected. A lot of the end users are victims of the drugs and the people higher up. That's what I mean by that.

MR. KIRBY: Would you have any difficulties following any laws given to you by the judge at the end of the case?

JUROR/CONN: No, sir.

MR. KIRBY: Thank you.

THE COURT: All right. If you'll wait outside then. Thank you very much.

Number—Mr. Gilbert, Don Gilbert. Hi, Mr. Gilbert.

JUROR/GILBERT: Hi.

[76] THE COURT: On your questionnaire, you said in question number eight, the answer:

"I would favor the prosecution."

Is that—are you saying that you would not be able to listen to the evidence, and decide what happened, and

follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?

JUROR/GILBERT: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

THE COURT: You understand that one of the things the jury will be told, of course, is that the prosecution, the Government has the burden of proving someone guilty beyond a reasonable doubt. And I suppose realistically, all things being equal wouldn't be beyond a reasonable doubt. Would you disagree with that?

JUROR/GILBERT: No, I guess I wouldn't disagree with that.

THE COURT: I guess the important question is —and perhaps let me ask it this way. It's kind of my question. But if you were the defendants here charged with this crime, and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?

JUROR/GILBERT: I think that's a difficult [77] question. I don't think I know the answer to that.

THE COURT: All right. Mr. Kirby, any questions?

MR. KIRBY: No, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: No questions, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: If you were going to error the close call between—

THE COURT: Well, we're not going to get into close calls either, those kinds of argumentative propositions, Mr. Garcia.

MR. GARCIA: If you were to error, where would you feel more comfortable erring, in favor of the prosecutor or the defendant?

JUROR/GILBERT: Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as I indicated on here, I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong.

THE COURT: Well, you see, you heard me out there when I started the trial. That's not the general proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption—

[78] JUROR/GILBERT: There's a—

THE COURT: —of guilty. The presumption is the other way. That's the way our system—

JUROR/GILBERT: I understand that in theory.

THE COURT: Okay, all right, all right. Why don't you wait, and we'll be done here in a few minutes; okay? Thank you very much.

Number 29, Etoy Hanserd.

MR. KIRBY: Judge, did we skip Ms. Gordon?

THE COURT: Who?

MR. KIRBY: Cindy Gordon?

THE COURT: I don't know whether I skipped her or not. I didn't call her. Oh, I guess I did. We'll come back. I guess I put him over and—Mr. Gilbert, and got Ms. Gordon in there too. Well we'll come back to that.

Sit down, please. You were scared.

JUROR/HANSERD: Yes.

THE COURT: You're not scared now, are you? No reason to be scared. That's the reason I banged on the table, because I didn't want you to be scared.

JUROR/HANSERD: Okay.

THE COURT: Let's see. You're a lab assistant. Tell me what you do.

JUROR/HANSERD: I draw blood. I do urinalysis, pregnancy tests, set rates.

[79] THE COURT: You have to keep your voice up.

JUROR/HANSERD: And collect specimens to send to the other outside labs.

THE COURT: Which lab do you work for?

JUROR/HANSERD: 7th Avenue and Buckeye.

THE COURT: Where did you go to school?

JUROR/HANSERD: Mesa High, and then phlebotomy at Phoenix College.

THE COURT: How long have you been doing this?

JUROR/HANSERD: Probably about 11, 12 years.

THE COURT: Do you like it?

JUROR/HANSERD: Yes.

THE COURT: Have any children?

JUROR/HANSERD: Yes.

THE COURT: What ages are they?

JUROR/HANSERD: Thirty-two, thirty-four and thirty-five.

THE COURT: I expected them to be in high school or less. Do they have any children?

JUROR/HANSERD: No.

THE COURT: What part of town do you live in?

JUROR/HANSERD: What part?

THE COURT: What part of town? What city do you live in?

JUROR/HANSERD: I live in Mesa.

[80] THE COURT: Mesa, east Mesa?

JUROR/HANSERD: I live on Center and off University.

THE COURT: Down by—not too far from the university then. Oh, Center, no. That is—yeah, I was thinking of Tempe. Center is the main kind of north-south street in town. I guess that's the reason they call it Center street. Huh?

JUROR/HANSERD: Yes.

THE COURT: You—I'd ask generally the question about making—you know—arriving at a decision in a case where someone's freedom might be affected. And on answer to question number seven, you said, because of your religious beliefs, "I would find it hard to judge others."

JUROR/HANSERD: Yeah. I don't—it's not something I would like or enjoy doing, judging others. I don't feel that I can—

THE COURT: I was going to say—

JUROR/HANSERD: —be fair.

THE COURT: —right. Well, I don't think anybody really enjoys it. I really don't.

JUROR/HANSERD: You know, I wouldn't feel—I don't think that I can— should.

THE COURT: You'd do it.

JUROR/HANSERD: If I really, really had to, but [81] if had a choice, I don't know.

THE COURT: But you think you could do it if you sat as a juror, you could listen to the evidence and simply decide what happened. That's really what a jury does, what happened. Would you do that?

JUROR/HANSERD: Yes.

THE COURT: The work you do in a way involves information that's being gathered. Is all of it gathered for medical purposes, or is some of it gathered for police agencies, things like that?

JUROR/HANSERD: Medical reasons.

THE COURT: Huh?

JUROR/HANSERD: Medical reasons.

THE COURT: Medical reasons?

JUROR/HANSERD: Okay. Mr. Kirby.

MR. KIRBY: No questions, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: None, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: None, Your Honor.

THE COURT: All right. Thank you very much for coming in. And seriously, I hope that if you have a chance to come back again, either here or in another trial, that you'll do it, because we really need people who live in a community and who are caring decent people to serve on [82] juries.

JUROR/HANSERD: Well, one of the problems I'm having right now, we just had a death in the family, and I'm still sort of in a grievance, and I'm not sleeping at all. I don't think I would be at my best at this time.

THE COURT: Okay. We'll keep that in mind as well. Thank you very much for coming in.

JUROR/HANSERD: Thank you.

THE COURT: Okay. Our next one I passed over, Cindy Gordon, number five. Hi. Be seated, please.

Mr. Bartolomei, any questions?

MR. BARTOLOMEI: None, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: You had mentioned that you had begun paralegal school. Will you tell us a little bit about your training and what type of paralegal you were preparing to come?

JUROR/GORDON: For a slip-and-fall personal injury field. That's what I took the courses for.

MR. GARCIA: Nothing further.

THE COURT: Mr. Kirby.

MR. KIRBY: Thank you. I'd just like to clarify. Question number five was your opinion regarding the laws relating to the use and possession and distribution of drugs, and you said, "I don't see the need for this kind of crime." [83] Could you explain what you mean by that? Are you talking about from a prosecution side, why we prosecute it, or why do people do it?

JUROR/GORDON: No, basically why people do it. There's enough out there, you know, with the murder and the bloodshed, we don't need anymore crime as far as drugs are concerned. I just have—you know, I have a pretty big issue on that. I just don't see the need.

MR. KIRBY: For people to do drugs?

JUROR/GORDON: Yeah, and why they go out there and sell them to people, especially younger children.

MR. KIRBY: How about the current need to prosecute drug cases?

JUROR/GORDON: Oh, yes, I believe that, yeah.

MR. KIRBY: Okay. Thank you.

THE COURT: All right. Thank you very much. If you'll just wait for a few more minutes, we'll be done here.

JUROR/GORDON: Okay.

THE COURT: The next one is Robert Johann, who's had the son with DPS. Hi, Mr. Johann. Be seated, please.

You told us, when we were asking questions generally to the jury, I think that you had a son who was a detective now with the DPS; is that correct?

JUROR/JOHANN: That's my son-in-law.

THE COURT: Son-in-law. Okay. And as you [84] understand it, did he go through the academy, the training program for highway patrol officers?

JUROR/JOHANN: Yes.

THE COURT: And then was he a uniformed officer for some time?

JUROR/JOHANN: Yes.

THE COURT: And now does he work undercover?

JUROR/JOHANN: No, he's not undercover.

THE COURT: He's married to your daughter?

JUROR/JOHANN: Yes.

THE COURT: Do they have children?

JUROR/JOHANN: Yes, three.

THE COURT: I take it they visit back and forth at family gatherings and things like that.

JUROR/JOHANN: Yes.

THE COURT: Do you think the fact that your son is a police officer in the sense that would impact on your serving as a juror in this case in being fair and impartial?

JUROR/JOHANN: No, I don't think so.

THE COURT: For instance, let's assume you listened to the evidence along with all the other jurors and decided the Government hadn't proved him guilty. Do you have any feeling—do you think that you'd be embarrassed or concerned about telling your son or family that you'd come down here in federal court and found somebody not guilty of a [85] drug charge?

JUROR/JOHANN: No.

THE COURT: You ever have any concerns just in passing about the safety of your son-in-law and the kind of work that he's in and the people that he may deal with?

JUROR/JOHANN: Well, he's in white-collar crime now. So you know, it's a lot safer than being on the highway.

THE COURT: All right. Mr. Kirby, any questions?

MR. KIRBY: No, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: Briefly, Your Honor.

Mr. Johann, has your son-in-law ever been injured while on patrol or on duty?

JUROR/JOHANN: No.

MR. BARTOLOMEI: Does your daughter ever express to you her concerns and fears about him being out on the field?

JUROR/JOHANN: No.

MR. BARTOLOMEI: Do you discuss particular cases with him?

JUROR/JOHANN: Well, when he was out on the highway, you know, he'd say he stopped this guy and

gave him a ticket for this and whatever, but now he doesn't say anything to me.

MR. BARTOLOMEI: I can understand that. Thank you. [86] Nothing further.

THE COURT: Mr. Garcia.

MR. GARCIA: Nothing.

THE COURT: All right. Thank you. If you'll just wait outside a few more minutes. Thank you.

THE COURT: Ms. Keil-Angelo.

You know the thing that's impressed me, what in the world would we do if all of a sudden everyone that works with computers in some way stopped. Half of our jury is involved with computers. It really is frightening.

Sit down. I was just telling these other good folks here, you know, half of our jurors or a third of our jurors at least are involved with computers, programmers or whatever. And I was wondering what would happen if all the electricity went off for a week.

Mr. Kirby, any questions?

MR. KIRBY: No, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: Yes, Your Honor.

Ms. Keil, you indicated your spouse was a federal probation officer.

JUROR/KEIL: Uh-huh.

MR. BARTOLOMEI Is that here in Phoenix?

JUROR/KEIL: Yes, it is.

MR. BARTOLOMEI: And how long was he doing that [87] before your separation, or how long had he been doing it?

JUROR/KEIL: Maybe a year.

MR. BARTOLOMEI: Okay. Did you ever discuss particular cases with him that he was working on, drug cases in particular?

JUROR/KEIL: No.

MR. BARTOLOMEI: He never brought his work home?

JUROR/KEIL: No. I have two little children. He can keep that away.

MR. BARTOLOMEI: I have nothing further, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: I'm sorry. I didn't understand by "keeping that away" what you meant.

JUROR/KEIL: He can keep his work at home —

MR. GARCIA: Oh, his work.

JUROR/KEIL: —I mean his work at work, as I keep mine at work.

MR. GARCIA: Thank you.

THE COURT: Mr. Kirby.

MR. KIRBY: Nothing.

THE COURT: All right. Thank you. We had Dean in yesterday. He was one of our officers that came in.

JUROR/KEIL: Oh.

THE COURT: We see him from time to time.

[88] Thank you for coming down. If you'll just wait outside a little longer. Thank you.

Our next one is Mr. Lanford, number nine. Hi, Mr. Lanford.

JUROR/LANFORD: How are you all doing?

THE COURT: Good. Let me ask, question number eight—

JUROR/LANFORD: Okay. I don't know how to write very well.

THE COURT: That's all right.

JUROR/LANFORD: Okay.

THE COURT: —about police officers principally.

JUROR/LANFORD: Okay.

THE COURT: Do you think that you'd be able to decide whether—objectively, reasonably, fairly whether a police officer was or wasn't lying?

JUROR/LANFORD: Yes, I believe so.

THE COURT: Because you seem to express the general opinion at least that you don't have a very high opinion of police officers.

JUROR/LANFORD: Correct. Mostly uniformed officers is—I've experienced not quite a bit of trouble, but on a few instances where I have been involved with, you know, patrol officers, I've had trouble.

THE COURT: When they pull up behind you and their [89] lights start flashing, you get nervous.

JUROR/LANFORD: Oh, yeah.

THE COURT: So do I.

JUROR/LANFORD: yeah, I get—

THE COURT: Everybody does.

JUROR/LANFORD: But I think it's primarily my outlook, how I—you know, my hair is long. I have a earring and so forth.

THE COURT: I wear a robe all day long, and then I get in my car and they stop me. I have the same problem.

JUROR/LANFORD: I just get nervous. I don't think I would have a problem with any judgment I would make.

THE COURT: Okay. Well, you told us, and that's the important thing.

Anything else, Mr. Kirby?

MR. KIRBY: Just one quick question. You said your brother had been arrested for marijuana some time in the past.

JUROR/LANFORD: Yes, sir.

MR. KIRBY: Would that cause you any problem in sitting on a drug case?

JUROR/LANFORD: No. What had actually happened is he didn't go to court on it or trial or even go to jail for it. They just took him down, called my mom. My mom came and got him. That was the end of the story.

[90] MR. KIRBY: Nothing in that bothered you?

JUROR/LANFORD: Oh, no.

MR. KIRBY: Thank you.

JUROR/LANFORD: I just had to mention it because—

THE COURT: That's fine. You answered the question.

Mr. Bartolomei.

MR. BARTOLOMEI: No questions, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: Nothing, Your Honor.

THE COURT: All right. Thank you very much for coming in.

JUROR/LANFORD: Thank you.

THE COURT: Remember, they flash at you. They flash at me too.

JUROR/LANFORD: I think it's just—

THE COURT: It's the nature of their job.

JUROR/LANFORD: —the nature of the game; right? Thank you.

THE COURT: Bye-bye.

Number 43, Mr. Lindsey—or Ms. Lindsey. Pardon me. She didn't fill out the back of her questionnaire. Sit down, Ms. Lindsey.

You didn't fill out the back of your questionnaire. So let me just ask you to do that, and then I'll tell [91] everybody what you put down. Take your time.

Okay. Five, no; six, no; seven, no; yes, no (sic).

Any other questions of Ms. Lindsey? Mr. Kirby?

MR. KIRBY: No, Your Honor.

THE COURT: Anyone else?

MR. BARTOLOMEI: None, Your Honor.

THE COURT: All right. Thank you very much, and we'll excuse you. Wait outside till we get done.

Our next one is Ms. Morlan, number 37.

Imagine how the world operates 15 years ago and here today.

Sit down, Ms. Morlan, please.

You say you're with the BLM.

JUROR/MORLAN: Uh-huh.

THE COURT: What's your thoughts about serving as a juror here, recognizing what you told us about your husband 15 years ago.

JUROR/MORLAN: I didn't know him then, and I wasn't really involved with it.

THE COURT: So that's something you've learned about since then.

JUROR/MORLAN: Yes. I've only known him for about five years.

THE COURT: And anything about his experiences or what happened to him, as you understand it back then, that [92] would affect your ability to be fair and impartial here?

JUROR/MORLAN: No, I don't think so.

THE COURT: As far as you know, did he do any time?

JUROR/MORLAN: No, he went to a rehabilitation center.

THE COURT: And he was younger then.

JUROR/MORLAN: Yes.

THE COURT: All right. Any other questions of this juror?

MR. KIRBY: No, Your Honor.

MR. BARTOLOMEI: None, Your Honor.

THE COURT: All right. I was saying what a strange thing it is, of all the cases we have, that you'd be selected to come for this particular trial.

JUROR/MORLAN: I don't know.

THE COURT: It's a strange world. All right. Thank you very much. If you'd just wait a few minutes for us.

Mr. Riley, please, number 33. He didn't fill out the back. Hi. Sit down.

JUROR/RILEY: Hi.

THE COURT: Mr. Riley, you didn't fill out the back of your questionnaire. So let me ask you to do that.

JUROR/RILEY: Oh, I'm sorry.

THE COURT: That's all right. Just do that and [93] take your time.

JUROR/RILEY: All righty.

THE COURT: And then we'll tell them all what you do.

JUROR/RILEY: Didn't bring my specs.

THE COURT: Want to borrow mine?

JUROR/RILEY: Might help.

THE COURT: I don't know whether they will or not.

JUROR/RILEY: Oh, yeah.

THE COURT: Got to give them back.

JUROR/RILEY: Would you explain that to me, Judge?

THE COURT: Sure.

JUROR/RILEY: I have an option. What's that mean?

THE COURT: What do you have an opinion regarding?

JUROR/RILEY: Oh, opinion.

THE COURT: Uh-huh.

JUROR/RILEY: Oh, I see.

THE COURT: Yeah.

JUROR/RILEY: Well —

THE COURT: Just say, "No." If you do, "Yes." And then you'd say, "Well, they ought to be this, that or whatever."

JUROR/RILEY: Yeah. Well, I have an opinion it shouldn't be, period.

THE COURT: Well, tell us that, then. Just say, [94] "Yes," and then tell us. You don't think we should have any laws related to drug sales?

JUROR/RILEY: Oh, oh, is that what that means?

THE COURT: Uh-huh. Well, whatever, just what your opinion is.

JUROR/RILEY: Well, I'm against drugs.

THE COURT: You're against drugs. Okay. Number six, against drugs. You don't have to write it down. I know it. Okay?

Let's give those glasses back.

JUROR/RILEY: Better give those back. Thank you, sir.

THE COURT: I got another pair. All right.

Well, yes, have an opinion. He told us they should be stricter. Six is, "No"; seven is, "No"; eight is, "No."

Any other questions then of Mr. Riley?

MR. KIRBY: No, Your Honor.

MR. BARTOLOMEI: Yes, I do. Excuse me, Mr. Riley.

JUROR/RILEY: Yes.

MR. BARTOLOMEI: When you say the laws should be stricter, are you talking about the punishment phase once they're convicted, if a person is convicted of a crime?

JUROR/RILEY: Well, I guess that's what I'm trying to say. I don't know how to put it the way you want to hear it I guess, but I'm just against drugs, period.

[95] MR. BARTOLOMEI: Okay.

JUROR/RILEY: I think they're destroying the body, you know.

MR. BARTOLOMEI: You have a very strong feeling about that.

JUROR/RILEY: Yeah, I do.

MR. BARTOLOMEI: Do you think you can set aside that feeling and be fair and impartial in listening to the evidence in this case?

JUROR/RILEY: Oh, yes, definitely.

MR. BARTOLOMEI: So that if the Government doesn't prove its case beyond a reasonable doubt, you would vote for a not guilty plea —

JUROR/RILEY: Yes.

MR. BARTOLOMEI: —not guilty verdict.

JUROR/RILEY: You bet. Yeah, I have no problem with that. I'm just—I'm against drugs for the body,

period because of what it's done to my body, you know. I mean I'm not talking about just cocaine or heroin or marijuana. I'm talking about drugs, period.

MR. BARTOLOMEI: Okay, thank you.

THE COURT: Mr. Garcia.

MR. GARCIA: I have nothing.

THE COURT: Mr. Kirby.

MR. KIRBY: No.

[96] THE COURT All right. If you'll wait outside just a few more minutes, Mr. Riley, we're just about done in here.

JUROR/RILEY: Okay, thank you, sir.

THE COURT: Uh-huh, thank you.

All right. Our next one is Ms. Varela, number 12. Sit down.

Mr. Kirby, any questions of the juror?

MR. KIRBY: No, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: None, Your Honor.

THE COURT: Mr. Garcia.

MR. GARCIA: What did you mean by "full extent of the law"?

JUROR/VARELA: As far as—let me see. If someone is convicted of a crime, I believe—and especially—and not necessarily a drug crime, but like a sexual abuse crime or something like that. I believe that in that case it should be punished to the full extent of the law, whatever that law allows for that crime.

MR. GARCIA: In this case there are multiple counts. Are you going to be able to look at each charge separately?

JUROR/VARELA: Certainly.

MR. GARCIA: Will you be able to give an opinion —a verdict to each charge separate as to whether you came up [97] guilty as to another charge? Do you understand what I'm saying?

JUROR/VARELA: Right, I understand. You're saying that there's three separate charges here.

MR. GARCIA: Three separate crimes.

JUROR/VARELA: Exactly. Sure.

MR. GARCIA: Nothing further.

THE COURT: All right. Just wait outside. Thank you very much. We're just about done.

The other one that we're going to ask to come in is Ms. Kolomitz. She's the one that came up and said it

might be a hardship for her to serve, number 20. Hi, Ms. Kolomitz.

JUROR/KOLOMITZ: Hi.

THE COURT: I understand you talked to Ms. Hightower during the recess and said that you're a single parent. It might be a hardship for you to serve as a juror.

JUROR/KOLOMITZ: Yes.

THE COURT: And you work where?

JUROR/KOLOMITZ: I work at the Safeway store in Sun City West.

THE COURT: Do you know what their—what Safeway's policy is if you serve on a jury? Do they pay you and take your jury fees?

JUROR/KOLOMITZ: I really don't, I really don't, huh-uh.

[98] THE COURT: What do you do there?

JUROR/KOLOMITZ: I'm a grocery clerk. I'm a cashier.

THE COURT: Uh-huh. Do you have children?

JUROR/KOLOMITZ: Yes, I have two boys.

THE COURT: What are their ages?

JUROR/KOLOMITZ: Nine and twelve.

THE COURT: How close do you live to where you work?

JUROR/KOLOMITZ: About a 35-minute drive.

THE COURT: You think you would be affected by serving as a juror, and it'd make it more difficult for you and your family?

JUROR/KOLOMITZ: Yeah, I think it would, but you know, if you need me, I can. It's no problem.

THE COURT: We pay I think $35 a day and— $40 a day and the mileage, 25 cents a mile and so forth. So it's a lot better to come to federal court than it is state court.

JUROR/KOLOMITZ: Yeah.

THE COURT: At state court, if you don't—for instance, we pay to come today. In federal—in state court, I went down there one day and sat around all day, didn't get—I went up to a courtroom and sat around for a while, and I got 18 cents. So I understand the problem. Well, we'll keep that in mind.

[99] JUROR/KOLOMITZ: Okay, thank you.

THE COURT: Okay? Thank you.

All right. Those are the folks that we pulled the questionnaires on who to ask questions. And we have

Mr. Sundeen, I think that said, can be excused. Do you still want to excuse Mr. Sundeen? Okay.

MR. KIRBY: That's fine.

THE COURT: All right. He's one.

The next one that we suggested that he would like to be excused perhaps is Mr. Sink, number 14, who just got back from a vacation. He works for Allied Signal, of course, which is a big company, et cetera. But what's your thought about excusing him? I think we obviously have a lot of—enough jurors to go around. Any particular reason to keep Mr. Sink?

MR. BARTOLOMEI: It's fine with me, Your Honor.

MR. KIRBY: I don't know how many more questions—I don't generally have an objection to letting him go. I just don't know how many more questions we have for them this afternoon.

THE COURT: I don't have any more essentially. I don't know of anymore to ask. I think I've gone through everything that—at least generally that was proposed. Do you have anything else?

MR. KIRBY: I was going to ask you to inquire about [100] guns.

MR. GARCIA: I believe I had some questions about violent crimes, Your Honor.

THE COURT: Okay.

MR. KIRBY: In general I don't have any objection in letting go of Mr. Sink when we get to the end—

THE COURT: Okay.

MR. KIRBY: —if we don't lose 10 people or something.

THE COURT: Okay. We had guns in our last case, didn't we?

THE CLERK: Uh-huh.

THE COURT: So we'll find whatever we asked about guns there. Maybe see if Sally could pull out that questionnaire we had that had the guns in it, huh?

We had—oh, the next juror also, number 15, Mrs. Smith, considered asking to be excused because of her final schedule in grading papers down at South Mountain Community College. Any objection to her one way or the other?

MR. KIRBY: I have no objection.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: I kind of want to keep her, but if it's going to pose a real hardship, then I'll go along with that.

[101] THE COURT: Well, I think she was ambivalent. I don't think that she was insisting that she be excused.

MR. BARTOLOMEI: It didn't seem that way to me.

THE COURT: No, I didn't think so. So you want to keep her.

MR. GARCIA: I would as well, Your Honor.

THE COURT: Okay. How about the lady we just had, Ms. Kolomitz? Any objection to excusing her?

MR. KIRBY: No.

MR. BARTOLOMEI: No objection.

THE COURT: Was there anyone else that wanted —oh, how about Ms. Hanserd, number 29, the lady we just talked to, the lab assistant and said she'd had a recent death in the family, et cetera.

MR. KIRBY: I would ask she be excused for that reason. She seemed a little emotional as she was talking to you about that particular aspect.

THE COURT: Seems like a very nice person, but I'm sure she's got a lot of problems there.

MR. GARCIA: I would want to keep her, Your Honor, for the following reasons.

THE COURT: You do or don't?

MR. GARCIA: I do. First of all, we have a very limited number of minorities in our jury. She's one of them.

Second, she talks I think very candidly about her [102] ability to judge. And based on the conversation you had with her, I believe that she could perform her duties quite well. She did mention that about the death in the family, but it appeared to me that her last comment was that she was still willing to participate. So I think she is able to serve as a juror at this time.

THE COURT: Well, I don't know there's any reason to strike her for cause. It does seem to me that she—she wants to be excused, and when she mentioned the death in the family she obviously had tears in her eyes and distressed about being here and involved in other people's problems. And so I but I won't strike her for cause. But on the other hand, as I say, I think there's reason that she could be excused for challenge, for that reason that she obviously is upset by her circumstances at present.

All right. How about Mr. Gilbert, number 31?

MR. GARCIA: I would move to excuse him for cause, Your Honor, based on his bias towards prosecutors.

MR. BARTOLOMEI: I marked him down as a challenge for cause, Your Honor.

THE COURT: Mr. Kirby.

MR. KIRBY: Your Honor, although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly.

THE COURT: I think he kind of fits in [103] Ms. Hanserd's position as well. You know about him and know his opinions. He said he did say that he could follow the instructions, and he said he—"I don't think I know what I would do," et cetera. So I think you have reasons to challenge him if you—strike him if you choose to do that, but again I think he fits in within Ms. Hanserd's parameters as well. I don't think—

MR. BARTOLOMEI: Your Honor, may I just one more thing regarding him?

THE COURT: Uh-huh.

MR. BARTOLOMEI: When he stated all things being equal, that to me indicated a disregard for Your Honor's instruction on the presumption of innocence, and that's the reason I marked him as a challenge for cause.

THE COURT: . Right. Well, then he came back and said yes, again that he would follow it and so forth. Again, he's—you know—about him and you can do what you wish to with him, but —

And then going on over, another one I marked was—Darryl Bingham couldn't set aside his personal opinion. Any reason to excuse that person, number 37—36?

MR. BARTOLOMEI: I have him down as a challenge for cause.

THE COURT: Any objection, Mr. Kirby?

MR. KIRBY: I'd like to, but I don't think I can.

[104] THE COURT: All right. I'll excuse him.

Those are the ones at least, as I went through, that I'd marked as—anyone else that you want to challenge for cause while we're in here?

MR. BARTOLOMEI: No.

THE COURT: I guess when the jury gets the instructions in the case, when they sit as jurors, they're going to know more about the gun and the involvement of the gun. What do you want to ask them? One of the questions I had on another questionnaire was:

"Do you have an opinion regarding the firearm laws of the United States?"

I suppose I'll ask them that, and then maybe someone will hold up their hand and then I'll talk to them about that. But I guess I didn't—I'll get your voir dire questions. What is it you want to ask about a gun? We know there was a gun there. Suggest—think the evidence is going to be that. What do you want to ask about the gun?

MR. KIRBY: I only wish to know whether any of them had strong—that strong of an opinion either way concerning the use of guns or the development of guns or whatever.

THE COURT: Do you have an opinion? And you think the next question: Should there be any restrictions on people's ability to buy, acquire, have firearms? Somebody holds up their hand. I suppose we recently had the Brady [105] Bill. It seems like we asked them questions about the Brady Bill before.

It seems to me the question more—the interest relates more to a circumstance. The case we had before recently was a felon in possession of a firearm, and so that really gets into kind of that as a factor.

But in any event, I'll ask them about what you said about firearms. I guess on my stand-up desk in there I have the voir dire questions. Could you just go in and get them? It should be right on the top there, Bobby, on the top of that desk someplace. I'll see what you've said.

How about anyone else who you wanted to challenge for cause?

MR. BARTOLOMEI: Your Honor, as far as the guns, I think the only question I would want to ask is the same as Mr. Kirby, whether anybody has had any experience with guns, or any experience that would make them feel strongly one way or the other about the presence of a gun in the trial. That would be it.

THE COURT: Anyone you wanted to challenge for cause that we haven't discussed, Mr. Kirby?

MR. KIRBY: I don't believe so, Your Honor.

THE COURT: Mr. Bartolomei.

MR. BARTOLOMEI: I don't believe so, Your Honor.

THE COURT: Mr. Garcia.

[106] MR. GARCIA: No, Your Honor.

THE COURT: Apart from the gun, and finally, "Okay, folks, we've talked to some of you individually. And again, any reason now any one of you, beyond what's been told us, you don't want to serve?" Anything else that we need to ask them about?

MR. KIRBY: Judge, did you read the witness list this morning?

THE COURT: No, I haven't. That's another good point.

The defendants have any witnesses or names that they want to give?

MR. BARTOLOMEI: No, Your Honor.

MR. GARCIA: No, Your Honor.

THE COURT: Remind me, I've got the witness list. Let's see here.

MR. KIRBY: Your Honor?

THE COURT: Uh-huh.

MR. KIRBY: There's one other area I'd like you to inquire. There may be an informant. There's an informant involved in the case that may or may not testify, but I'd just like you to ask our general question, which is number seven in our submitted.

THE COURT: Well, of course, I guess it would have been well to know that earlier too, because that's a question [107] I have started including in a questionnaire, if there is one.

MR. KIRBY: Oh.

THE COURT: Simply because I think again you get a much better answer on a questionnaire to that matter. But in any event, yes, I'll ask them.

MR. KIRBY: That's all I have.

THE COURT: Okay. Well, we'll ask about—someplace here I made—okay, we'll ask about the guns. We'll ask about the witnesses. We'll ask about informant. We'll ask about any other reason that beyond what's been told to us.

Now, our procedure is when we get done, I'll ask if you have any other questions to ask. You will get each—the defendants together have 10 strikes. The Government has six. We do it simultaneously. So the Government gets a list. They make their strikes. You get a list, Mr. Bartolomei and Mr. Garcia make their strikes. We'll have an alternate. So after you strike for the jury, there's 12 people that are going to be the jury. Then below those jurors, you can strike—each side has another strike. And you can't strike above the line for

somebody that's on the jury. And so we'll have—each side gets another strike for the alternate.

When we seat the jury, we mix the alternate in. We'll all know who it is. And when the trial is over, that [108] is the person who will be excused. We don't go through any other process of doing that. So that's how that'll work out.

About how long do you think it would be before you would get back to—before we have the jury come back?

MR. KIRBY: From my perspective, about 20 minutes.

THE COURT: Half hour? Why don't we say half an hour.

And if you and—if Mr. Bartolomei and Mr. Garcia want to do it in here with your clients, there's only one way out and that's the door here. And so you can come in and work in here if you want to with your clients; okay?

MR. KIRBY: That'll be fine.

THE COURT: All right.

MR. KIRBY: Thank you, Your Honor.

THE COURT: So that's what we'll do.

Anything else? Now we'll see how we are. That's going to get us—it's 2:00, 2:15. It'll be close enough, I

suppose. Everybody just prefer that we have our opening statements on Thursday?

MR. KIRBY: Yes, Your Honor. From my perspective, it's very brief.

THE COURT: Well, you know, we'll start at 11:00 on Thursday, give Mr. Garcia time to motor back leisurely from Mesa, and—

MR. GARCIA: Your Honor, the real issue and the [109] reason I wanted the time is because there's counsels flying in from across the—we may be able to resolve that matter with some time as well.

THE COURT: You mean you may not have that—

MR. GARCIA: We'll have the pretrial conference—

THE COURT: Oh.

MR. GARCIA: —but we may be able to eliminate an entire two-week trial by us all being there.

THE COURT: As long as it's not my two-week trial, I'm very disinterested.

THE CLERK: You excused Neal Sundeen, Darryl Bingham and Julie Kolomitz, those three?

THE COURT: Let's see here. We've got —

THE CLERK: Just want to be sure.

THE COURT: Yeah, we just pull them out now, huh? So we've got Kolomitz, Mr. Sundeen and who else did you say?

THE CLERK: Darryl Bingham.

THE COURT: And Mr. Bingham. Okay?

THE CLERK: Okay.

THE COURT: All right. Are we ready to go?

(Proceedings Concluded)

THE COURT: All right. We're going to excuse three people now, and then go ahead and ask a few more questions, and then take a recess while we—and everybody else will have to wait until we pick the jury and seat the jury, and [110] then the rest of you will be excused. So we're getting well along in the process.

We concluded, because of Mr. Sundeen's trial on Monday to excuse you, Mr. Sundeen. Thank you. And I noticed in the paper, also while you're leaving us, that your client and neighbor passed away.

JUROR/SUNDEEN: Yes.

THE COURT: So I know how hard you worked for his cause, and so I hated to see that. Thank you for coming.

JUROR/SUNDEEN: Thank you.

THE COURT: We will also excuse Ms. Kolomitz and also Mr. Bingham. And they're excused and do not have to stay.

The rest of you, just a few more questions or bits of information about our proceeding.

It's always difficult in a trial as well to know who may be called as witnesses, but let me read you some names that have been suggested as possible witnesses, and ask you if you know any of these people, and if so, simply hold up your hand and let us know.

Humberto Rodriquez, who's a drug enforcement agent James Bentley with the Drug Enforcement; Phillip Springer, same agency; Albert Reilly, Chuck Gulick who's with the DEA; Doug Grey who's an agent with the Alcohol, Tobacco & Firearms; Jose Isabel Gonzales-Riviera; Todd Davidson; Steven [111] Dauphin, D-A-U-P-H-I-N.

All right. Along that same line of possible witnesses, members of the jury, there may be in this case testimony of a person who acted as an informant for the Government and may have had some agreement with the Government regarding acting as an informant. And if so, you would be instructed at the end of the trial that the testimony of such a person should be considered, and that that's a circumstance for the jury to consider in judging their credibility and whether that testimony should be judged more carefully than the testimony of other witnesses.

Any of you believe that the Government should not use informants in an criminal case in order to assist in

the investigation or prosecution of crimes? And any of you believe you wouldn't be able to follow whatever the instructions we'd give you about how to judge and consider the testimony of a witness who had that background?

All right. Another—one of the charges of the case, and I think I mentioned it to you when I was describing the charges, is Count 3 in the indictment refers to the fact that there were allegedly two firearms at a location and that those firearms were there during and in relation to a drug-trafficking crime. And so that will be one of the counts that the jury has to consider in this case.

And so the general inquiry of you—let me ask, [112] how many of you folks have guns at home? Just hold up your hand to give us some idea of how many people have guns at home.

Let me ask anyone on the jury panel if you would hold up your hand if you do belong to any organization that advocates any restrictions on the right of people, citizens, ordinary citizens to have guns in their possession, assuming they're being carried lawfully and things like that? Any of you have any—belong to any organization that thinks there should be some restriction or qualification on the right of people generally to have firearms?

We recently had, I think, a lot of publicity in the newspaper about the Brady Bill in Congress, and I'm certainly not any expert on the Brady Bill. Seemingly a part of it was a requirement that persons who would—for a period of time, persons buying handguns, there

was a five-year (sic) waiting period. Any of you interested yourself particularly in the pros or cons of the Brady Bill and what it was intended to do?

With respect to guns themselves, and any of you have any opinions for or against guns that again would simply cause you to vote for or against guilty or not guilty in a case where the Government would prove beyond a reasonable doubt that a gun was there and you received instructions from the Court about how to consider that issue?

[113] All right. Any other questions by counsel? All right. Hearing none then, what we're going to do, members of the jury, it's five minutes after 2:00. We're going to give you kind of an early recess. And what we're going to do during that period of time, or what the lawyers will be doing, as I mentioned earlier, they have the right to go through, check their notes. Each side in a trial gets what are called a certain number of preemptory challenges that they can strike people for whatever good reasons that they may have.

Let me say also that the law is clear now in the United States that people cannot be taken off of a jury for reasons that are related simply to race, or religion or gender. And if it appears that that is happening or suspected of happening, then the Court inquires into that. The other side can object. So I want you to understand that that's how the law is now in the United States. People cannot strike all of one sex or race or whatever. You can't do that. And so that's not what they're going to be making their decisions about.

So we'll take a recess until 20 minutes of 3:00. And when you come back then at 20 minutes of 3:00, please just be seated in the back of the courtroom. You don't have to come up and be seated where you are. And then the people who have been selected to serve on our jury will be called, [114] and we'll ask again any reason you can't serve. If the people who are seated say they can, then we'll swear them in and excuse everybody else.

As you can tell, also, some of you mentioned you'd been called or been on other jury panels and you hadn't been selected or whatever. A good bit of the selection process, I'm sure as you can understand, is simply where you're seated, based upon the number of jurors there are on the panel and how far down in the panel the strikes extend, et cetera. So that's really what happens to a lot of folks. They're simply in the last 10 or 12 people on the jury, and—the jury panel and they're never really involved in the process.

On the other hand, you can understand why we need those folks here, because every jury panel is different, and their background and their personal experiences. And so you never know how many you're going to have. So that's how it works.

In any event now, with that little bit of history, why please be back at 20 minutes of 2:00—3:00—pardon me —20 minutes of 3:00, seated in the back of the courtroom and we'll get everybody on their way before too long.

So don't talk about the case still, don't think about it and don't share your experiences.

(Jury Panel Out at 2:12 p.m.)

[115] (Recess from 2:12 p.m. to 2:13 p.m.)

MR. KIRBY: I have no objection to—

THE COURT: To excusing him? All right.

MR. GARCIA: I would move to excuse him for cause, Your Honor.

THE COURT: Well, there's no cause in the sense that we're simply conveniencing him. He wants to be excused because of his work schedule. All right. So he's excused, and mark him off on your list, so when you go to make your strikes you don't have to look at him. All right?

MR. GARCIA: Thank you, Judge.

(Recess from 2:13 p.m. to 3:03 p.m.)

(Jury Room Proceedings at 2:45 p.m.)

MR. BARTOLOMEI: Your Honor, we had an unusually low number of minorities represented in this jury panel. And it was our unfortunate luck that the few Hispanics that were on the panel were at the very end. We didn't get a chance to really address those. But there were two potential black jurors, number 15, Mary Smith and number 29, Etoy Hanserd.

Now, with regards to Mary Smith, she indicated—there was no indication that she could not be fair and

impartial, and in fact I think it was to the contrary. And she even indicated that she wanted to see tougher drug laws and penalties for those involved in the sale of drugs—nothing to indicate that she could not follow Your Honor's [116] instructions, and yet we have a challenge from the Government.

Likewise, with regards to Etoy Hanserd, she was the shy potential juror that came in and spoke with us and answered our questions. And despite having grief for a recent loss in her family, indicated she could follow Your Honor's instructions and she would also be fair and impartial. And likewise, Your Honor, the Government has exercised a challenge there.

And that leaves us effectively with no minorities at all, and we question whether or not there was another reason for those challenges or striking minorities from the panel. I think it's incumbent upon the Government to show a valid reason for those challenges.

MR. GARCIA: Your Honor, I just merely join in the—Mr. Bartolomei's argument.

THE COURT: Mr. Kirby.

MR. KIRBY: Your Honor, as regards Ms. Smith, she indicated very early on that she had some employment problems. She had some finals coming up at South Mountain Community College. She'd indicated she already asked and apparently had been excused once for that particular reason. And so in exercising my preemptory, since she indicated a potential work problem, as we had with Mr. Sink and Ms. Kolomitz,

excused them for work-related problem and [117] whatnot, I exercised my strike on her.

THE COURT: And Ms. Hanserd.

MR. KIRBY: On Ms. Hanserd, as I indicated while we were in chambers or the jury room taking jurors one by one, my assessment of her was that the death in the family. She was the one who brought up she was still in bereavement. She seemed quite tearful when she discussed it, and I didn't think that it indicated an ability to perhaps deal with high-pressure matters that occur in jury deliberations. She seemed quite upset by this particular death in the family. And as I had mentioned then as I do now, I think that would —my assessment that would cause her difficulty in sitting and deliberating in this case.

THE COURT: Well, I'd mentioned earlier about Ms. Hanserd of my observations of her, that she was of course very nervous about of her responsibilities. I think her questionnaire indicated that she would—she really didn't want to be in a position where—or would find it difficult to make a judgment about other people.

More importantly, I think her concerns about her current circumstances and the fact that there has been the recent death in the family. And I think, as a matter of fact, she said there was still—the family was going through a period of bereavement. That she would like to be excused, and that—I think that Mr. Kirby's assessment of [118] her situation and her concerns about her circumstances is a reason to exercise a challenge for her. I don't think that implicates her or her race at all. She is a black African-American.

With respect to the other juror, I guess she told us that she'd been excused before at her request and was reluctant to ask to be excused again. She did ask to be excused. I think she said she would like to be excused, because they're in the finals now, and she's going to have to grade all of the papers that are generated through the final exam process.

I think on the other hand, that she can serve and was willing to serve, and I don't think that there's—for the reasons that have been stated, that there's an appropriate reason to exercise a preemptory challenge with respect to her. And so for that reason, failing anything else then, she will serve on our jury. And that would mean that our—so you can—and that would exclude then Christine Pelander as a juror; right, Ms. Hightower?

THE CLERK: Or she'd be the alternate.

THE COURT: And then, of course, that leaves us where we are on the alternate. And so there hasn't been a challenge. It would appear generally the defendants have struck nothing but white males; is that right?

MR. GARCIA: I do not believe so, Your Honor. I [119] believe we struck Reba Varela and Cynthia Gordon, Your Honor, the two females that I can think of off the top of my head.

THE COURT: Well, so what do we want to do now about our—to get an alternate? Do you want to

strike again for the alternate, or are you satisfied that—

The Government—one, two, three, four, five six. The Government didn't strike for an alternate, or there hasn't been a strike for an alternate?

MR. KIRBY: I have struck the alternate before this.

THE COURT: Oh, I see. Well, you struck down so far that it wouldn't make any difference.

MR. KIRBY: Well, now under the current setup.

THE COURT: Right. So I will—I guess the best thing to do is to let the parties strike again for an alternate. Is that satisfactory?

MR. KIRBY: Yes, fine.

THE COURT: So go strike for an alternate, and then come—or if you want to do it now or whatever, and then we'll do that; okay?

THE CLERK: She will not be the twelfth juror.

THE COURT: Well, she would be the first person that would be a prospective alternate.

THE CLERK: Right.

THE COURT: So the first prospective alternate [120] would now be Christine Pelander, and the next one would be Donald Gilbert, Arnold Riley, et cetera.

MR. GARCIA: Your Honor, Donald Gilbert has been—

THE COURT: Well, but—

MR. GARCIA: —has already been stricken.

THE COURT: Well, but the only reason he was as an alternate, and you're going to—

MR. GARCIA: He was stricken during our preemptories.

THE CLERK: Yeah, he was—this was a preemptory. The defendant struck him.

THE COURT: Oh, okay. Well, where are the alternate strikes?

THE CLERK: There weren't any. I gave them—

THE COURT: Well, so they haven't struck for the alternate yet.

THE CLERK: Actually the defense did. The defense struck James Allen.

THE COURT: Well, how did they do that?

THE CLERK: Because I gave them back the list.

THE COURT: Okay. And the defendants hadn't stricken for an alternate.

THE CLERK: The Government—did the Government strike for an alternate? I haven't seen the Government's list.

[121] MR. KIRBY: Yes. I struck Mr. Allen.

THE CLERK: Actually both of them struck.

THE COURT: Okay.

THE CLERK: This is the defense's strike for an alternate and this is the Government's strike, but this is prior to me—

THE COURT: All right. Now well let's go back again. And you're going to strike—

MR. GARCIA: Your Honor, as I understand it, the next three people would be Christine Pelander, Arnold Riley and Julie Ball.

THE COURT: Right. That agreeable?

MR. KIRBY: Yeah.

THE COURT: All right. So you can strike for those people, and then—

THE CLERK: So the alternate would be—

MALE VOICE: Riley.

THE CLERK: —Arnold Riley, be the thirteenth juror.

THE COURT: So why don't you read us off now, Bobby, who the jurors will be.

THE CLERK: Okay. Number one would be Robert Johann.

THE COURT: Who, Johann?

THE CLERK: Johann, J-O-H-A-N-N.

[122] THE COURT: Okay.

THE CLERK: Number two is Martin Johnson; number three is Joel Schotz; number four is Mary Smith; number five is Merle Baker; number six is Barbara Schaller; number seven is Joel Bollinger; number eight is Richard Conn; number nine is Susan Chmielewski; number 10 is Darvin Finck; number 11 is Mary Simmonds; number 12 is Martin Welter, and the alternate is number 32, Arnold Riley.

THE COURT: All right. Any objection now to any of those jurors?

MR. GARCIA: None from us.

THE COURT: Any further objection to our procedures?

MR. KIRBY: No, Your Honor.

THE COURT: All right. Very well then, the clerk will call those names when we go back in. They'll come up, be seated. I'll ask them again any reason you can't serve. If they say no, we'll swear them in. We'll excuse

everybody else and then we will recess until Thursday morning at 11:00. Okay?

MR. GARCIA: Thank you, Your Honor.

MR. KIRBY: Thank you, Your Honor.

(Recess)

THE COURT: All right. Then the clerk will please call the names of those persons who have been selected to [123] serve on our jury. And as I say, as your names are called, just come up, and the first one be seated in the back row. And again we'll keep the seat behind the post vacant so that when it gets to that time, the next person will just come up and be seated in the front row. So the clerk will call the roll.

THE CLERK: Robert Johann, Arnold Riley, Martin Johnson, Joel Schotz, Mary Smith, Merle Baker, Barbara Schaller, Joe Bollinger, Richard Conn, Susan Chmielewski, Darvin Finck, Mary Simmonds, Martin Welter.

THE COURT: Let me just—

THE CLERK: I'm sorry. It's Martin Johnson.

THE COURT: Martin Johnson? Yeah.

Let me just read the names, and then we'll see how they work out. Robert Johann, Martin Johnson, Joel Schotz, Mary Smith, Merle Baker, Barbara Schaller, Joe Bollinger, Richard Conn, Susan—we know Susan. Well, I didn't have it spelled out right. Darwin (sic) Finck, Mary Simmonds, Martha (sic) Welten (sic),

Martin Welten (sic) and Arnold Riley. Who are we missing?

MR. BARTOLOMEI: Finck didn't show up.

THE COURT: Huh?

MR. BARTOLOMEI: Darvin Finck, I think, is missing, Your Honor.

THE COURT: Darwin (sic) Finck. Present? Darwin? [124] Where did Darwin go?

THE COURT: The marshals want to check the men's room to see if there's anybody that's not here now?

No one there. Bobby?

THE CLERK: I was just going to—

THE COURT: Pardon?

THE CLERK: I just asked the jury commissioner to see if he had gone down there.

THE COURT: How about having her check the cafeteria?

THE COURT: All right. Let me see counsel for a minute.

(Side Bar Conference)

MR. GARCIA: Your Honor, my thoughts are that the next three people on the list are James Allen, Francisco Olivas and Doris Morlan, and that we each have one strike, and that that person becomes a juror, not an alternate.

THE COURT: Well, I think what I'm going to do arguably is just go with who we've got, and I'll tell the marshals to locate Mr. Finck and have him here Thursday. How about that? We're getting too many playing around with alternates and really just picking people now after everybody knows what else is happening. And I just—I see that as a kind of a problem.

MR. KIRBY: I don't have a problem with your [125] solution if you will—when he shows up on Thursday, you have an opportunity to inquire what happened to him. I don't want necessarily somebody sitting on there that's going to poison the trial if he's got some particular binge or something. But I'd like to find out what happened to him.

THE COURT: Well, we'll just go with 12 and tell them they have to be here next week. If they lose, we'll have to have a mistrial, unless they're deliberating.

MR. KIRBY: Go with 11.

THE COURT: We can't go with 11 unless they're deliberating.

MR. GARCIA: I would again just move that we go to the next three just like we did a moment ago. And I think the other advantage of doing that, Your Honor, is

that also gets us now into the area where we finally in this jury panel have a Hispanic.

THE COURT: Well, that's all your point is, you see, Mr. Garcia. That's exactly what I object to in this process, is maneuvering like we're doing.

MR. GARCIA: Your Honor, I didn't send Mr. Finck out.

THE COURT: I know that, I know. But in any event, I'm just going to go with the 12 we've got.

MR. BARTOLOMEI: It's a sure enough thing we should be able to deal with that.

[126] MR. GARCIA: Want to do that, Your Honor?

THE COURT: Yeah, we'll do that, and we'll get him back. And if there's some problem, we'll still just go with 12.

(End of Side Bar Conference)

THE COURT: All right. Twelve of you are seated in the jury box now. Is there any reason why any one of you now can't fairly and impartially serve as a juror in the case? All right. The clerk will swear the jury.

(Jury sworn)

THE COURT: All right. Members of the jury panel now seated in front of me, we're going to excuse you. Your time with us has ended. Thank you very much for coming and being here, and we appreciate

your time and attention. And as I've said earlier, I hope that you'll have another opportunity to come back, whether on this panel this month or at some other time, and that you'll come and have a chance to serve. Because if you do that, I'm sure you'll understand a whole lot more about what citizenship means and what the responsibilities of being a juror are. So we'll excuse you now. Thank you very much for being with us.

All right. Those of you now who are on our jury, as I've told you, we're going to take a recess until 11:00 on Thursday, have you back then. We'll go—have the opening statements, take a lunch break and start the evidence on [127] Thursday as well.

And let me remind you again now not to talk about the case. Don't discuss it when you go home or wherever you go today, work, or elsewhere. People ask you where you are and what you're doing, simply tell them that you're on a jury in federal court and that you're not able to discuss with them whether it's a civil or a criminal case or what it's about. And if there's anything in the newspaper about something similar or anything else, just put it aside and read it or talk about it after the trial is over.

We also have 12 jurors, and that's what we need. So it really puts an additional burden on each of you to be with us on Thursday. If you have some problem, illness or something else, why call in and let us know ahead of time, if you can ahead of time. But it's really important now that we have to have you all here. We don't have the luxury of, at least at this moment, of having an alternate.

And so with that in mind, why remember to be back not tomorrow, but at 11:00 on Thursday, and we will need you surely on Thursday and Friday and possibly on Monday. So keep that in mind. We'll see you then. So you're excused then until Thursday at 11:00. Thank you.

All right. Be seated for a second while they get started. We're going to ask the jury commissioner to call Mr. Finck at his phone number where we catch him and see if [128] we can get him back today. And if we can, we'll do that, and we'll call you so that you can come back and we can find out what his circumstances are and about his ability to serve as a juror, et cetera. So we'll try to do that and try to get it done today. If not, we'll have him here on Thursday to discuss the matter; okay? All right.

MR. GARCIA: Thank you, Your Honor.

THE COURT: Uh-huh. And I would encourage everyone to be here at quarter of 11:00 so that we can discuss any of our problems or other matters before we do get started. So Mr. Garcia, we'd hope that you would be able to be with us at that time as well.

MR. GARCIA: I'll make every effort, Your Honor.

THE COURT: Thank you.

THE CLERK: May I have your questionnaires, please?

THE COURT: And turn back in your questionnaires, if you would, please, so that we can have those.

If we need Mr. Finck, why we can keep that around, a copy of it.

(Proceedings Concluded at 3:17 p.m.)

—oOo—

[129]

CERTIFICATE

I (we) certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Dated: May 31, 1994 /s/ HAROLD FERGUSON
HAROLD FERGUSON

UNITED STATES DISTRICT CORUT
DISTRICT OF ARIZONA

No. CR 93-284-PHX-EHC

UNITED STATES OF AMERICA, PLAINTIFF

against

ABEL SALAZAR AND
CELSO ORGANISTA-DORANTES, DEFENDANTS

[Filed: Dec. 15, 1993]

JURY LIST

NAMES OF JURORS	EXCUSED BY				
	PLAINTIFF		DEFENDANT		COURT
	C	PER	C	PER	
1. Alvin Mann				X	
2. John Kelly				X	
3. Robert Johann					
4. Neal Sundeen					X
5. Cynthia Gordon				X	
6. Silvio Vaninetti				X	
7. Robert Rendek				X	
8. Martin Johnson					
9. Christopher Lanford		X			
10. Ronald Eckard		X			
11. Joe Schotz					
12. Reba Varela				X	
13. Robert Dunst		X			

NAMES OF JURORS	EXCUSED BY				
	PLAINTIFF		DEFENDANT		COURT
	C	PER	C	PER	
14. Edward Sink					X
15. Mary Smith		[X]*			
16. Mark Gilmore				X	
17. Merle Baker					
18. Robert Schroeder				X	
19. Barbara Schaller					
20. Julie Kolomitz					X
21. Dennis Hultz		X			
22 Joe Bollinger					
23. Richard Conn					
24. Susan Chmielewski					
25. Darvin Finck					
26. Mary Simmonds					
27. Martin Welter					
28. Kimberly Keil				X	
29. Etoy Hanserd		X			
30. Christine Pelander		X			
31. Donald Gilbert				X	
32. Arnold Riley					
33. Julie Ball				X	
34. James Allen		X*		X*	

---

* The government's peremptory challenge to juror No. 15, Ms. Smith, was disallowed by thc court when it granted the defense objection to that challenge under Batson v. Kentucky, 476 U.S. 79 (1986). See supra, pp. 175-178. The peremptory challenge used by the government on Ms. Smith was forfeited. Originally, the government and the defense each used their one peremptory challenge designated for the selection of the alternative juror (see supra, p. 167)) on juror No. 34, Mr. Allen. See supra, p. 181. When Ms. Smith was placed on the jury, juror No. 30, Ms. Pelander, who

35. Francisco Olivas					
36. Darryl Bingham					X
37. Dorisa Morlan					
38. Shuhui Fan					
39. Clifford Schlueter					
40. Jeffrey Smith					
41. Cynthia Wineman					
42. Jeannie Collins					
NAMES OF JURORS	**EXCUSED BY**				
	PLAINTIFF		**DEFENDANT**		**COURT**
	C	**PER**	**C**	**PER**	
43. Georgia Lindsey					
44. Bonnie Baker					
45. John Velez					

had not originally been struck from the jury, was no longer the twelfth juror. See supra, p. 179. The court then granted both the government and the defense one additional challenge to select an alternative among the next three available jurors, No. 30, Ms. Pelander, No. 32, Mr. Riley, and No. 33, Ms. Ball. See supra, p. 181. The government then struck Ms. Pelander and the defense then struck Ms. Ball. *Ibid.*.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR 93-284-PHX-EHC

THE UNITED STATES, PLAINTIFF

vs.

ABEL MARTINEZ-SALAZAR,
CELSO ORGANISTA-DORANTES, DEFENDANTS

TRANSCRIPT OF JURY TRIAL

[Index omitted]

[3] *December 9, 1993*

THE CLERK: You may be seated.

MR. GARCIA: Your Honor, to date—to the moment we are yet with an interpreter. (sic)

THE COURT: I'd like to proceed in the meantime.

MR. GARCIA: I'm not sure if I'm supposed to start this, Your Honor, but prior to beginning the trial at 11:00 today, I am going to move to strike Mr. Finck as a juror. Additionally I'm going to move this Court for a mistrial based on how this jury was constituted.

As to my first motion to striking Mr. Finck, I was in jury selection yesterday in another matter in front of Judge Broomfield when Mr. Finck was called to the panel. And at that time Mr. Finck walked in and saw me also defending another individual in another narcotics matter.

THE COURT: Well, when did this all occur in the case?

MR. GARCIA: This occurred yesterday, Your Honor.

THE COURT: I understand. Where in the proceedings? What time of the day?

MR. GARCIA: It occurred during jury selection, Your Honor.

THE COURT: All right. Well, where in the jury selection?

MR. GARCIA: Prior to the jury selection, he was [4] brought in —

THE COURT: Well, how would he know what you were there for?

MR. GARCIA: Your Honor, the point that I am making is —

THE COURT: Well, how would he know what you were there for, Mr. Garcia?

MR. GARCIA: Your Honor, I am not going to speculate as to what is in Mr. Finck's mind, however there is the —

THE COURT: Well, how would he know?

MR. GARCIA: Your Honor, I think he did see me at a defense table with two individuals who were defendants.

THE COURT: Well, he wouldn't know you were there for a drug case, a gun case, a civil case or whatever.

MR. GARCIA: Yes, but it is also possible, and I'm not going to speculate as to what Mr. Finck thinks, and we can ask him if you would like, but I will say that the possibility has now arisen that Mr. Finck may now infer that I am a big-time defense attorney who is defending multiple individuals in multiple-defendant cases.

THE COURT: That's absurd.

MR. GARCIA: Your Honor —

THE COURT: We have cases that go to trial continually. Lawyers try cases several times before the same [5]—in the same panel, they may come in and not get selected and come back and get selected again. So you see, Mr. Garcia, that's just wild speculation, and not only that, but you haven't told me anything that suggests that the jury panel, at the time you saw Mr. Finck there, knew what kind of a case it was or anything else.

MR. GARCIA: That is correct, Your Honor, but I am also noting—I am making a record in case there is an appeal in this matter, and I think I would be remiss—

THE COURT: Well, you better have facts before you make a record, Mr. —

MR. GARCIA: —remiss in my duties if I didn't—

THE COURT: Mr. Garcia, when I speak you stop. And you'd better have a record before you make it. You'd better have some facts before you make it.

MR. GARCIA: The facts are, Your Honor, that Mr. Finck chose to leave the jury selection process in this matter without instruction by this Court. Additionally—

THE COURT: Let's wait here. Now we have the interpreter coming.

MR. GARCIA: As I was saying, earlier, just to bring the clients up to speed, Your Honor, I am making two motions today, one to strike Mr. Finck individually, and one to strike (sic) for a mistrial because of the composition of the jury.

[6] As for the facts regarding Mr. Finck, Mr. Finck was instructed by this Court not to leave the courtroom. Mr. Finck chose to do so despite the Court's instructions. Mr. Finck has already demonstrated that he is incapable of properly following the instructions of this Court by leaving the courtroom.

Furthermore, my clients may have been prejudiced by the fact that Mr. Finck was called, Mr. Finck was called in another jury pool in which I was a defendant (sic). I will not speculate as—

THE COURT: You were not a defendant.

MR. GARCIA: Pardon me?

THE COURT: You said you were a defendant. You're not a defendant.

MR. GARCIA: Where I was representing the defendant, Your Honor. Excuse me. But for all we know, Mr. Finck could've thought I was the defendant. I am not going to speculate as to what Mr. Finck thinks, however I'm bringing those facts to the Court's attention because I believe he should be stricken for his inability to follow your instructions, and furthermore because of the possible prejudicial impact of his viewing me in another matter.

Second, Your Honor, I respectfully disagree with the Court as to your characterizations of what we attempted to do on Tuesday during our jury selection. I did not [7] attempt to, quote, manipulate the system, unquote. I was only advocating for my client as I best can, given the limits of my talents.

Now the situation was as follows: Mr. Finck had failed to reappear. The next three individuals that should have been called for us to determine the procedure that had been set up just moments earlier, were juror number 34, Mr. James Allen, juror number 35, Mr.

Francisco Olivas, and a juror number 36—37, Doris Morlan. Based on my—

THE COURT: I thought Mr. Olivas was the third one.

MR. GARCIA: He was the second, Your Honor. It would've been number 34, James Allen; number 35, Francisco Olivas; and number 37, Doris Morlan. Mr. Allen, during the jury selection, admitted that he was a recovering alcoholic, and he also has an attorney brother in the Securities Exchange Commission. We would've used those reasons to strike Mr. Allen. That would have left the Government with either Ms. Morlan or Mr. Olivas.

Mr. Olivas made no comments whatsoever that would have formed the basis for him to be stricken by the Government. Likewise, if he in fact had been stricken by the Government, we would have made another *Bassett* challenge because he would have been the only Hispanic on the pool.

What the effect of Your Honor's refusing to allow us to go forward and choose an alternate for Mr. Finck at [8] that time has done is, if—

THE COURT: Well, you didn't want an alternate, you wanted that person to move up and take priority over the person who was the alternate and selected previously, that's what you wanted—

MR. GARCIA: Your Honor—

THE COURT: —Mr. Garcia.

MR. GARCIA: —if that is the understanding of the Court, then I apologize. We were—

THE COURT: That's what you—pardon me. That's what you said expressly.

MR. GARCIA: Well, we—

THE COURT: You said you wanted him seated as a juror, not as an alternate.

MR. GARCIA: Well, the alternate had already been selected, Your Honor.

THE COURT: No, the alternate was ahead of that person, Mr. Garcia. Let's—you got anything else to say?

MR. GARCIA: The effect of either not allowing us to choose another juror or to choose another alternate has the effect of, should this matter go to trial with this jury, and an individual is for some reason unable to deliberate, the next person to deliberate would have been a Hispanic, therefore the Court's unwillingness to allow us to select another individual, despite the fact that Mr. Finck had [9] already demonstrated to this Court that he was unable to follow the Court's instructions—

THE COURT: You've said that so many times now, let's keep going.

MR. GARCIA: —I think is prejudicial and is basis for a mistrial, and therefore I believe we need to reconstitute a new jury panel and select a new jury.

THE COURT: Mr. Bartolomei, you object to Mr. Finck being brought in and seated?

MR. BARTOLOMEI: No, I don't, Your Honor. I have to respectfully disagree with my co-counsel. I've never seen a case in either the Second Circuit where I practice or in the Ninth Circuit, where being even a popular defense attorney has been grounds for a mistrial or for finding a juror ineligible. So I must respectfully disagree with co-counsel.

THE COURT: Well, Mr.—what's your thoughts, Mr. Kirby? I guess in the final analysis, if Mr. Garcia objects to Mr. Finck sitting on the jury, I'm just going to leave him off the jury, and we've got the next person who was the alternate, who was selected properly as the alternate. Mr. Finck isn't on the jury, and we will have Mr. Riley who was selected as the alternate will be a juror, and we will not have an alternate. That's what I said the other day and that's what we will continue to do.

[10] MR. KIRBY: Your Honor, either situation is fine with me. I think just perhaps you might just want to inquire of Mr. Finck if there is anything to—number one, you know, what happened on Tuesday, and did he make any note of the fact that he may have seen Mr. Garcia yesterday.

THE COURT: Well, I don't know when Mr. Finck left, and if I—Ms. Hightower talked to him, and since

Mr. Garcia objects to Mr. Finck being on the jury, I'm going to just not put him on the jury, and we've got an alternate, and as far as I can see, everything is just—is in accordance with law.

My understanding is that Mr. Finck thought his name was called when I excused the three people that I did before—and the only reason, again, that I'm inclined to just not put him on the jury, I asked a couple of additional questions after I excused those three people. And so giving consideration to that fact, I'm simply going to go where I was the other day and we'll go with 12 jurors, and they'll be here, and they're here now, and that means at 11:00 we're going to have—I'll read a few instructions to them, generally about life and coming to court on time, and then we'll go from there, have our opening statements. Mr. Kirby.

MR. KIRBY: Your Honor, it's my intention, if all goes correct, to play one or two tape recordings, and you know about the transcipts. I don't know the Court's [11] preference. I would like permission either to have the agents or the court interpreter to signal the jury when to turn a page. The tapes are in Spanish, transcripts of course are in English. And in order to facilitate the jury as to knowing where they are so that they can kind of at least keep pace with the tones and inflections in the tape, I would ask that either the agent or the court interpreter give them the hi sign that it's time to turn the page.

THE COURT: Why don't we depend on the interpreter to do that, Mr. Velasco or Ms. VanDuzer.

MR. KIRBY: Thank you.

THE COURT: You can do that, Mr.—you've done that before, Mr. Velasco.

THE INTERPRETER: Yes, Your Honor.

THE COURT: All right. Any objection to that?

THE INTERPRETER: None at all, sir.

THE COURT: All right. Then we'll go back home to our other courtroom and be ready to go all in good spirits and the best of good humor.

All right. All right. Thank you very much.

And so I'm going to have Bobbi just excuse Mr. Finck. We had him come back down, but considering the fact that arguably he left with—when those three left, and the fact that there were a couple of extra questions, why I'm just going to leave him off.

[12] MR. GARCIA: Your Honor, after consulting with some people, I feel I must state something for the record, whether it impacts on the case or not. But I need to place on the record that I am presently in simultaneous trials here in federal court selecting jury on one day in one case, jury in another in another, and then going from one court to the other as far as the proceedings. That's—

THE COURT: But when are you going back to Judge Broomfield?

MR. GARCIA: I'm going back this afternoon, Your Honor.

THE COURT: Well, we're going to be here all afternoon.

MR. GARCIA: They're waiting for me as soon as we're done, I'm—

THE COURT: Well, we're going to go until 4:00 today.

MR. GARCIA: They're aware of that, Your Honor. I'll—

THE COURT: Well, and let me just say one other thing, perhaps I'm wrong, but in talking at some time with Judge Broomfield, he indicated that you were agreeable to that.

MR. GARCIA: That is correct, Your Honor, and I'm not saying that I'm not agreeable. I'm saying that I need—

[13] THE COURT: Well, then, if you're agreeable, fine, if not, you go down and talk to Judge Broomfield, because we started our trial first. And if you have a point to make, you make it with Judge Broomfield.

MR. GARCIA: Your Honor, I am not complaining. I have been advised that for a record, in case there is an issue of ineffective assistance of counsel, I need to make that record that I am in fact participating in two trials at the same time.

THE COURT: If you had asked to be in one trial and only one trial, you could've addressed that to me, or you could've addressed it to Judge Broomfield, but my understanding is you went before Judge Broomfield and told him you were willing and able to do that.

MR. GARCIA: I have—

THE COURT: And having said that to Judge Broomfield, if you want to have further discussions, you have them with Judge Broomfield.

MR. GARCIA: Thank you, Your Honor.

(Recess from 10:44 a.m. to 11:05 a.m.)

THE CLERK: Come to order. You may be seated.

THE COURT: All right then, ready for the jury. All right. When the jury comes in, I have just a few general instructions to read to them and then we will have the opening statements.

* * * * *

(5)

No. 98-1255

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID C. FREDERICK
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

52 pp

QUESTION PRESENTED

Whether a defendant is entitled to automatic reversal of his conviction when he uses a peremptory challenge to remove a potential juror whom the district court erroneously failed to remove for cause, and he ultimately exhausts his remaining peremptory challenges.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 98-1255

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 146 F.3d 653.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998 (Pet. App. 20a-21a). On January 4, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1999. The petition was filed on February 4, 1999, and was granted on June 21, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Section 2111 of Title 28 of the United States Code and Rules 24 and 52 of the Federal Rules of Criminal Procedure are reproduced in an appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent Abel Martinez-Salazar was found guilty of conspiracy to possess heroin with intent to distribute it (21 U.S.C. 846), possession of heroin with intent to distribute it (21 U.S.C. 841(a)(1)), and using or carrying a firearm during and in relation to a drug trafficking offense (18 U.S.C. 924(c)(1)). J.A. 50-52; Pet. App. 2a. He was sentenced to 123 months' imprisonment. J.A. 51. Respondent appealed, and the court of appeals found an impairment of his right of peremptory challenges that, it held, "require[d] automatic reversal." Pet. App. 3a.

1. This case involves the jury selection for the joint trial of respondent and his co-defendant.[1] Jury selection took place in one day. J.A. 56. First, the jury venire of 45 potential jurors was put in random order. J.A. 66-68. The trial judge asked the venire whether any potential jurors had scheduling conflicts that might interfere with a trial that would begin on Thursday of that week and was expected to end on Monday of the following week. J.A. 68-70. Three jurors mentioned possible conflicts: No. 4, Neal Sundeen, a lawyer, advised the court that he had a trial beginning the next Monday (J.A. 70-71); No. 14, Edward Sink, an employee of Allied Signal Aerospace, told the court that he had just returned from a two-week vacation and a four-day business trip and was having a hard time keeping up with his workload (J.A. 71-72); and No. 15, Mary Smith, an English instructor at a community college, stated that she was concerned about her ability to grade hundreds of papers at term's end (J.A. 72). The court took no immediate action on those requests.

[1] The procedures followed by the district court may be discerned from the transcript of the jury selection, which is contained in its entirety in the Joint Appendix at pages 56-189, and the master jury list kept by the clerk and filed in the district court record, which is contained in the Joint Appendix at pages 190-192.

Next, the court asked each potential juror to recite information concerning matters listed on a sheet of paper each juror was given, including his or her name, community of residence, employment, education, marital status, employment of spouse, military service, and prior jury service, including the outcome of any such cases. J.A. 72-89. The court then gave the venire a description of the jury selection process and the expected schedule. J.A. 89-92. Juror questionnaires were distributed and completed during a recess. J.A. 90-91, 92.

When court reconvened, the judge gave the potential jurors general instructions about the conduct of a criminal case, including admonitions that the indictment is not evidence, that the government bears the burden of proof beyond a reasonable doubt, that defendants are presumed innocent, and that the jury was to determine guilt or innocence based on the evidence and the law as explained to it by the court. J.A. 92-97. The court asked whether any of the potential jurors "believe[d] that for whatever reason you simply would not want to serve as a juror here, or don't think that you could serve fairly and impartially as a juror in this case * * *?" J.A. 97. No juror indicated any such impediment to serving. *Ibid.*

The court introduced the lawyers and the parties, and asked the potential jurors whether any were acquainted with anyone involved in the case. J.A. 97-99. The court then asked the venire a series of questions, including whether any of the potential jurors spoke Spanish (translators would be used for defendants); opposed incarceration as a punishment; knew any of the other potential jurors; had, or had family members with, present or past government employment; had legal training; or had any hearing or other physical problem that might interfere with jury service. J.A. 99-110. Some jurors responded to some of these questions, but each assured the court that he or she would be able to serve fairly and impartially. *Ibid.* The court again asked the venire whether anyone did not desire to serve, and no potential juror sought to be excused. J.A. 110.

The venire then took a recess during which the lawyers were asked to review the questionnaires. The court reconvened, without the venire, for the lawyers to identify which potential jurors they wanted individually questioned. J.A. 112-113. Seventeen of the 45 potential jurors were identified for further questioning. J.A. 113-120. The court questioned each in turn and permitted the lawyers to ask any supplemental questions they wished. J.A. 119-159.

One of the potential jurors who was individually questioned, No. 31, Don Gilbert, stated on his questionnaire that he "would favor the prosecution." J.A. 131-132. When asked about that by the judge, Gilbert clarified: "I think what I'm saying is all things being equal, I would probably tend to favor the prosecution." J.A. 132. In response to a question by respondent's trial counsel, "where would you feel more comfortable erring, in favor of the prosecution or the defendant?,"

Gilbert stated: "I think, as I indicated on [the questionnaire], I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong." J.A. 133. When reminded by the court of the earlier instruction on the presumption of innocence, Gilbert responded, "I understand that in theory." J.A. 134.

At the conclusion of the individualized questioning, the court consulted with counsel about those potential jurors who had asked to be excused for personal reasons. There was consensus that Sundeen (No. 4), the lawyer, could be excused, and he ultimately was. J.A. 70-71, 112, 158-159, 169-170. Likewise, there was no objection to excusing Sink (No. 14), who had returned from vacation to face a heavy workload, and he too ultimately was excused. J.A. 71-72, 159-160, 175. There also was no objection to excusing Julie Kolomitz (No. 20), a single parent who told the court during individual questioning that it would be a hardship for her to serve, and she ultimately was excused. J.A. 156-158, 161, 169-170. The government was content to excuse Smith (No. 15), the teacher who was concerned about her workload, but defense counsel objected and the court did not excuse her. J.A. 72, 160-161. Likewise, the government was content to excuse Etoy Hanserd (No. 29), who revealed during individual questioning that she recently had a death in the family, but defense counsel objected and the court did not excuse her. J.A. 134-138, 161-162.

The court considered two for-cause challenges. Defense counsel sought to exclude Gilbert (No. 31) for cause but the government opposed it. J.A. 162. The court observed that Gilbert said he could follow instructions, and the court declined to excuse him for cause. J.A. 163. Both the government and defense counsel

agreed that Darryl Bingham (No. 36) should be excused for cause because he had stated during individual questioning that he would not be able to set aside his personal opinions, and he was excused. J.A. 121-125, 163-164, 170-171.

After further discussion with counsel about additional instructions, the court reconvened with the whole venire present. J.A. 169-170. The potential jurors were instructed about the possible testimony of a government informant and asked whether any potential juror believed that the government should not use informants. J.A. 171-172. The court also told the venire that one of the charges involved firearms. The potential jurors were asked whether any owned firearms, belonged to any organization that advocated restrictions on the ownership of firearms, or harbored any opinion about guns that would affect their impartiality. J.A. 171-173.

The court then had counsel make their peremptory strikes. Pursuant to Federal Rule of Criminal Procedure 24(b) and (c), respondent and his co-defendant were jointly given ten peremptory strikes to pick the 12-person jury and one additional strike to pick the alternate. The prosecution was given six strikes to pick the jury and one to pick the alternate. Counsel were directed to exercise their strikes simultaneously, first to pick the 12-person panel, and then, once the clerk collated the jury lists and returned them to counsel, to pick the alternate. J.A. 167-168, 175-176, 180. That process allowed the possibility of both parties striking the same juror, which did not happen in picking the initial 12-person jury, but both parties did simultaneously strike the same potential alternate juror. J.A. 179-181. The record does not reflect how the co-defendants decided among themselves how they would

exercise jointly their peremptory challenges. After the principal and alternate strikes had been made, the following jurors were selected (J.A. 182-183):

No. 3, R. Johann
No. 8, M. Johnson
No. 11, J. Schotz
No. 17, M. Baker
No. 19, B. Schaller
No. 22, J. Bollinger
No. 23, R. Conn
No. 24, S. Chmielewski
No. 25, D. Finck
No. 26, M. Simmonds
No. 27, M. Welter
No. 30, C. Pelander
Alternate: No. 32, A. Riley

The defense had used one of its ten peremptory challenges to strike Gilbert (No. 31). J.A. 180. Respondent neither requested an additional challenge nor said that any other juror was objectionable as a regular juror. Both parties struck potential juror No. 34, James Allen, as an alternate juror, being content with both Arnold Riley (No. 32) and Julie Ball (No. 33). J.A. 181.

Defense counsel next raised a challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the government's peremptory strikes of the two black potential jurors, No. 15, Smith (the school teacher with a heavy workload), and No. 29, Hanserd (who had the recent death in the family and did not want to serve). J.A. 175-176. The court asked the government to provide race-neutral explanations for the strikes. J.A. 176-177; see *Batson*, 476 U.S. at 97. The government responded that Smith raised her potential work problems, and that

Hanserd appeared to be upset by the death in her family. J.A. 176-177. The court allowed the strike of Hanserd to stand, but disallowed the strike of Smith. J.A. 177-178. The court found that, although Smith asked to be excused, she was willing to serve and "I don't think that there's * * * an appropriate reason to exercise a peremptory challenge with respect to her." J.A. 178. Smith was placed on the jury. The government did not request to exercise the peremptory strike that had been disallowed, and the court did not offer that opportunity.

The inclusion of Smith on the jury had the effect of bumping Christine Pelander (No. 30) off the 12-person panel. J.A. 178. The court considered the possibility that Pelander, who had been acceptable to the parties, might become the alternate. J.A. Tr. 178-179. Instead, the court decided to give each party one additional peremptory strike to choose an alternate. The next three jurors on the list were Pelander (No. 30), Riley (No. 32), and Ball (No. 33). The government struck Pelander and the defense struck Ball, leaving Riley, once again, as the alternate juror. J.A. 181-182.

The clerk read off the following names of the selected jurors (J.A. 183):

No. 3, R. Johann
No. 8, M. Johnson
No. 11, J. Schotz
No. 15, M. Smith
No. 17, M. Baker
No. 19, B. Schaller
No. 22, J. Bollinger
No. 23, R. Conn
No. 24, S. Chmielewski

No. 25, D. Finck
No. 26, M. Simmonds
No. 27, M. Welter
Alternate: No. 32, A. Riley

Darvin Finck (No. 25), however, was not present to answer when the clerk called his name. J.A. 183-184. Defense counsel suggested that the defense and the prosecution be given an additional peremptory strike and that the next selected juror should substitute for Finck on the 12-person jury, without affecting the status of Riley as the alternate. J.A. 185-186. Defense counsel explained that this suggestion would make it possible to add an Hispanic to the jury because the next three available jurors would include Francisco Olivas (No. 35). J.A. 185-186. The court declined that suggestion. It decided to accept the jury as selected and to have the marshals attempt to locate Finck. J.A. 184-189. When trial commenced two days later, Finck was excused, so Riley became the twelfth juror and the trial proceeded without an alternate. J.A. 199-200. As a result of that process, the defense exercised 12 peremptory challenges in selecting the jury that served during the trial.

2. The court of appeals reversed respondent's convictions based on the "impairment" of respondent's right of peremptory challenge. Pet. App. 1a-19a. It first held that the district court abused its discretion by refusing to excuse potential juror Gilbert for cause. *Id.* at 7a-8a. Relying on this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the court held that the error did not constitute a violation of the Sixth Amendment, because Gilbert did not actually sit on the jury. Pet. App. 9a. The court held, however, that the error amounted to a violation of respondent's right to due

process under the Fifth Amendment. The court reasoned that the defense was forced to use a peremptory challenge to remove a juror who should have been removed for cause, and that the defense was thereby effectively denied a peremptory challenge to which it was entitled by law. *Id.* at 9a-14a. The court held that, because respondent was denied the right to use his full complement of peremptory challenges as he saw fit, automatic reversal was required without any inquiry into whether the error was harmless. *Id.* at 14a-15a.

Judge Rymer dissented. Pet. App. 15a-19a. She concluded that the loss of a peremptory challenge does not amount to a constitutional violation. *Id.* at 15a. In any event, Judge Rymer explained, respondent never suggested to the district court that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Gilbert. *Id.* at 16a. Judge Rymer therefore concluded that there was no indication that respondent was adversely affected by the district court's refusal to remove Gilbert for cause. *Ibid.* Judge Rymer further stated that respondent could obtain relief only if he could establish plain error, because he had not adequately preserved an objection based on the denial of his right to exercise peremptory challenges. *Id.* at 16a-17a. Finally, Judge Rymer concluded that respondent had failed to demonstrate plain error because he could show no prejudice and because it was far from clear that the use of a peremptory challenge to remove a juror who should have been excluded for cause amounts to a due process violation, or even to a denial of the right to peremptory challenges provided by Rule 24 of the Federal Rules of Criminal Procedure. Pet. App. 17a-18a.

SUMMARY OF ARGUMENT

I. The right of federal criminal defendants to exercise peremptory challenges is created by federal rule, not by the Constitution. Such challenges "are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), this Court held that a defendant who was forced to "waste" a peremptory challenge by using it to remove a juror who should have been removed for cause was neither denied an impartial jury nor any liberty interest under the Due Process Clause. The Court concluded that applicable state law required a defendant who objected to the denial of a for-cause challenge to use a peremptory strike to cure the error. Thus, the defendant in *Ross* received all to which he was entitled as a matter of state law. This Court should reach a similar conclusion about the right to exercise peremptory challenges under Rule 24 of the Federal Rules of Criminal Procedure. Recognition of a procedural requirement that a defendant must use a peremptory challenge to cure the judge's error in denying a challenge for cause is consistent with the purpose of the peremptory challenge to assist in empaneling an impartial jury and, by preventing the need for retrial, the requirement conserves judicial resources when a trial judge has made an error in assessing the impartiality of a potential juror.

Even if the rule-based right of peremptory challenge under Rule 24 is found to be impaired when a defendant "wastes" the challenge to cure an erroneous ruling on a challenge for cause, it does not amount to a constitutional violation unless the error actually results in the

seating of a biased juror. In general, the infringement of a nonconstitutional rule of procedure does not rise to the level of a due process violation. *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982). Rather, such an infringement forms the predicate for a due process claim only where it "results in prejudice so great as to deny a defendant h[is] Fifth Amendment right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The district court's error in refusing to excuse a potential juror for cause simply led the defense in this case to use one of its peremptory challenges to achieve the same purpose; that consequence cannot reasonably be said to have deprived respondent of a fair trial.

II. Even if there was an impairment of respondent's rights to exercise peremptory challenges under Rule 24, and even if that impairment were viewed as implicating the Due Process Clause, the error is subject to harmless-error analysis, and, in this case, is harmless. Rule 52(a) of the Federal Rules of Criminal Procedure directs that an error in a federal criminal case shall be disregarded unless it affects "substantial rights." If the jury that decided the case was fair and impartial, the impairment of respondent's exercise of peremptory challenges did not affect substantial rights.

A small class of fundamental rights has been found "so intrinsically harmful as to require automatic reversal" without showing an effect on the outcome of the trial, but that is only because errors in that class "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999). The error in this case bears no resemblance to those errors. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis."

Rose v. *Clark*, 478 U.S. 570, 579 (1986). Respondent had counsel and was tried before an impartial jury. Any impairment of his rule-based right to make an arbitrary exclusion of a trial juror did not produce a fundamentally unfair trial.

A rule of automatic reversal for such an error in these circumstances would produce substantial injustice. Per se reversal would force the criminal justice system to bear the costs of retrial, a process that often would impose particular strains on victims of crime, witnesses attempting to recall prior events, and society's reasonable expectation in the finality of the judicial process. While the intangible values furthered by the peremptory challenge are important, in this setting the infringement of those values is not of sufficient consequence to justify the requested remedy of reversing a conviction after a fundamentally fair trial. And given the inevitability of errors that impair peremptory challenges in the hurly burly of jury selection, automatic reversal for such errors would impose burdens on the criminal justice system in a substantial number of cases.

Even if reversal without a specific showing of prejudice were warranted in some cases where a peremptory challenge is "wasted" on a juror who should have been excused for cause, the record in this case does not support that result. The defense in this case was allocated a total of ten peremptory challenges to select the original jury, and it had unimpaired use of nine. The defense thus substantially enjoyed the right to participate in jury selection through the exercise of peremptory challenges, despite any error involving one such challenge. Moreover, although respondent ultimately exhausted his peremptory challenges after having "wasted" one to remove the juror who should

have been excused for cause, respondent never objected to any juror who remained on the jury or indicated that he would have exercised an additional strike if he had one. On this record, there is no indication that the jury that ultimately decided respondent's case would have been composed differently even if his for-cause challenge had not been erroneously denied.

ARGUMENT

I. A DEFENDANT'S RULE-BASED OR DUE PROCESS RIGHTS ARE NOT VIOLATED WHEN HE EXERCISES A PEREMPTORY CHALLENGE TO REMOVE A JUROR WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE

This Court has "long recognized that peremptory challenges are not of constitutional dimension." *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988) (citing *Gray* v. *Mississippi*, 481 U.S. 648, 663 (1987)); *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."). Because a defendant has no constitutional right to peremptory challenges in a criminal case, the existence of any such right is solely the product of statute or rule. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994); *Ross*, 487 U.S. at 89; *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948). In this case, Rule 24 of the Federal Rules of Criminal Procedure affords a criminal defendant the right to exercise peremptory challenges. In light of the history and purpose of peremptory challenges to serve as "but one state-created means to the constitutional end of an impartial jury and a fair trial," *McCollum*, 505 U.S. at 57, there is no "impairment" of that right if the defendant uses a peremptory challenge to remove a juror who should have been removed for cause. And even if the Court were to conclude that there is an impairment of the defendant's rule-based rights in that situation, such an impairment does not rise to the level of a due process violation.

A. The Right To Exercise Peremptory Challenges Under Federal Rule Of Criminal Procedure 24 Is Subject To Reasonable Procedural Limitations

Because peremptory challenges are not guaranteed by the Constitution, both the existence and nature of the right to make such challenges in federal criminal cases turns on a construction of Federal Rule of Criminal Procedure 24. As applicable to this case, Rule 24 specifies that, for the selection of the 12-person jury for the trial of a non-capital felony, the government is entitled to six peremptory challenges and the defendant or defendants are jointly entitled to ten peremptory challenges. Fed. R. Crim. P. 24(b). In a multiple-defendant case, such as this one, the district court has discretion to allow defendants additional peremptory challenges and to determine whether they shall be exercised separately or jointly. *Ibid.* When one alternate juror is selected, as happened in this case, one additional peremptory challenge is granted to the government and to the defendants jointly, and it may be used only in the selection of the alternate. Rule 24(c).

Rule 24 does not specify in any other relevant way what procedures the court should employ in jury selection. In such matters, the district courts have long been

given broad discretion. See *Pointer* v. *United States*, 151 U.S. 396, 410 (1894); *Lewis* v. *United States*, 146 U.S. 370, 377 (1892). By longstanding practice, federal courts have imposed a variety of procedural restrictions on the exercise of peremptory challenges, many of which might be said to "impair" an individual defendant's effective use of those challenges. This Court has held, however, that so long as the empaneled jury is fair and impartial, a defendant's rights have not been infringed.

Although Federal Rule of Criminal Procedure 24 was promulgated in 1946, a federal statutory right to peremptory challenges in some form dates to 1790.[2] At common law, a party could exclude a potential juror, who would otherwise qualify for service, without providing a reason, and the federal statutes allowing such peremptory challenges carried forward the underlying purposes of that practice. See *Swain* v. *Alabama*, 380 U.S. 202, 214-220 (1965). The central purpose of the peremptory challenge is to provide reinforcement for the right to an "impartial jury." U.S. Const. Amend. VI. See *Frazier*, 335 U.S. at 505 ("the right is given in aid of the party's interest to secure a fair and impartial jury"); *J.E.B.*, 511 U.S. at 137 n.8 ("[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial

[2] See *Holland* v. *Illinois*, 493 U.S. 474, 481 n.1 (1990) (discussing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119). A general right to exercise peremptory challenges in federal non-capital cases did not exist until the Act of June 8, 1872, ch. 333, 17 Stat. 282, unless a local rule of the federal court adopted a provision of state law allowing such challenges, Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119. See *Frazier*, 335 U.S. at 505 n.11.

trier of fact.") (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).[3]

Judicially imposed limitations on the exercise of peremptory challenges are a necessity. As the Court noted in *Ross*, "the concept of a peremptory challenge as a totally freewheeling right unconstrained by any procedural requirement is difficult to imagine." 487 U.S. at 90. It is therefore not surprising that the exercise of peremptory challenges has long been subject to constraints. *Ibid.* For example, this Court has held that a defendant may not complain, in a joint trial, that his co-defendants had "impaired" his tactical use of peremptory challenges to select a jury by using their

[3] Blackstone elaborated on the purpose of the peremptory:

> [I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment: to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

4 William Blackstone, *Commentaries* *353 (quoted in *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).

peremptory challenges to strike jurors acceptable to him, *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827), or that he was forced to share his peremptory challenges with his co-defendants, thus reducing the number he could independently exercise, *Stilson* v. *United States*, *supra*. The Court has also upheld federal court practices requiring simultaneous use of peremptory challenges by the defense and the government, even though that method might cause the defendant to "waste" a peremptory challenge on a juror simultaneously excused by the prosecution. See *Pointer*, 151 U.S. at 409, 412 (acknowledging that "[i]t is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government," but finding no impairment of the right of peremptory challenge). The Court has approved a practice under which each potential juror, in turn, must be challenged either for cause or peremptorily and, if not excused, sworn before another juror is considered, even though that process limits the defendant's ability to allocate his peremptory challenges among potential jurors. See *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894) (finding it "not inconsistent with any settled principle of criminal law, nor does it interfere with the selection of impartial juries"). The fundamental reason why each described procedure has been endorsed, despite its alleged adverse effect on the tactical use of peremptory challenges by defendants to dictate the composition of juries, is that it did not "interfere with the selection of impartial juries." *Ibid.* That is all the Constitution requires, see *Stilson*, 250 U.S. at 586, and that is the main objective of granting peremptory challenges, see *Ross*, 487 U.S. at 88.

B. Requiring A Defendant To Use A Peremptory Challenge To Strike A Juror Who Should Have Been Removed For Cause Is A Reasonable Procedural Rule

Measured against those standards, a requirement that a defendant must use a peremptory challenge to "cure" the trial court's erroneous denial of a for-cause strike should not be found to impair the rule-based right of peremptory challenge. Rather, requiring the defendant to use the challenge to remove the partial juror is consistent with the core purpose of granting peremptory challenges—to assist in securing an impartial jury.

Although the Court has never addressed this question as a matter of federal law,[4] it has examined a similar question arising under state law. In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the Court concluded that a defendant could not base a due process claim on the theory that having to use a peremptory challenge to cure a trial court's error in denying a for-cause challenge "arbitrarily depriv[ed] him of the full complement of * * * challenges allowed under Oklahoma law." *Id.*

---

[4] The Court explicitly noted in *Ross*, 487 U.S. at 91 n.4, that it "need not decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." Compare *Stroud* v. *United States*, 251 U.S. 15 (1919), on denial of rehearing, 215 U.S. 380, 382 (1920) (defendant asserted that prejudicial error occurred when he had used a peremptory challenge to remove a juror who should have been struck for cause; rehearing denied because, *inter alia*, the record showed that the defendant had been allowed 21 challenges, one more than the law required, "and the record does not disclose that other than an impartial jury sat on the trial").

at 89. The Court held "[i]t is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror." *Ibid.* "Even then," the Court added, "the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." *Ibid.* Thus, the Court concluded, "[a]s required by Oklahoma law, [the defendant] exercised one of his peremptory challenges to rectify the trial court's error [in denying a challenge for cause], and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails." *Id.* at 90-91.

Federal law should be construed to contain a similar procedural requirement.[5] In view of the unquestioned

[5] While several courts of appeals have concluded that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges," *United States* v. *Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); accord, *e.g.*, *Kirk* v. *Raymark Indus., Inc.*, 61 F.3d 147, 161 (3d Cir. 1995) (collecting cases), cert. denied, 516 U.S. 1145 (1996), the cases following that rule have been criticized for contradicting "a line of earlier cases" holding that, even where the defendant exhausted his peremptory challenges after using one to remove a juror who should have been removed for cause, the burden rests on the challenging party "to demonstrate that because he used a peremptory challenge on an incompetent venireman, an objectionable juror was allowed to serve," *United States* v. *Allsup*, 566 F.2d 68, 76 (9th Cir. 1977) (Foley, D.J., concurring). In view of the common-law heritage of the federal peremptory challenge right, the proper rule to be adopted for federal practice may be illuminated by administration of the peremptory challenge in the States. Twenty-six

legitimacy of procedural restraints on the defendant's use of peremptory challenges to influence the composition of the jury, see pp. 17-18, *supra*, there can be no claim that a defendant must have absolute freedom to use challenges in whatever way the defendant wishes. Rather, defense peremptory challenges have always been subject to court-imposed procedural limits so long as they are consistent with "settled principles of criminal law [recognized] to be essential in securing impartial juries for the trial of offences." *Pointer*, 151 U.S. at 408. As the Court acknowledged in *Ross*, peremptory challenges are "a means to achieve the end of an impartial jury." 487 U.S. at 88. It is entirely consistent with that purpose to require that defendants use their peremptory challenges to remove jurors whom the court should have removed for cause, thereby protecting the impartiality of the jury. In selecting a jury, defendants as well as the prosecution can be expected to exercise responsibility for preserving the fairness and integrity of the trial, even while pursuing their own aims. Cf. *Georgia* v. *McCollum*, 505 U.S. at 50-55, 59 (even though a criminal defendant seeks to protect private interests, participation in selection of such a "quintessential governmental body" constitutes state action for equal protection purposes, such that a criminal defendant's "purposeful discrimination on the ground of race in the exercise of peremptory chal-

States have a rule that a defendant may not challenge on appeal a trial judge's error in denying a for-cause challenge where the defendant exercised a peremptory challenge to remove the juror, and those States do not appear to have reversed a conviction on the theory that such a use of a peremptory challenge constitutes a prejudicial "impairment" of the peremptory-challenge right. (We have collected in an appendix to this brief a summary of the positions taken by the state courts.)

lenges" is prohibited). "[T]here is nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Ross*, 487 U.S. at 90.

C. Any Impairment In This Case Of The Right To Exercise Peremptory Challenges Does Not Violate The Due Process Clause

Even if this Court were to conclude that a federal criminal defendant's rule-based right to exercise peremptory challenges is impaired when he uses a strike to remove a juror who should have been removed for cause, that impairment would not by itself give rise to a due process violation. The question whether the impairment of the right constitutes a violation of the Due Process Clause turns on whether the violation "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986); *Estelle* v. *McGuire*, 502 U.S. 62, 75 (1991) (Due Process Clause comes into play where an error "so infused the trial with unfairness as to deny due process of law") (quoting *Lisenba* v. *California*, 314 U.S. 219, 228 (1941)). An impairment of the rule-based right to excuse a juror without cause is not an error of constitutional dimension.[6]

---

[6] In contrast, constitutional error does occur when a biased juror sits on the case because the defendant was improperly deprived of a peremptory challenge that would have allowed the defendant to remove him. Cf. *Irvin* v. *Dowd*, 366 U.S. 717 (1961). There is, however, no general reason to find a constitutional violation based on the impairment of peremptory challenges unless it results in the seating of a biased juror. A due process violation in this context requires a showing of prejudice to a fair trial, and if the jury that sits is impartial, no such showing can generally be made. See pp. 28-31, *infra*.

The impairment of a defendant's right to exercise peremptory challenges does not deny the defendant the right to be tried by a fair and impartial jury. In *Ross*, this Court rejected the view that a state court's erroneous denial of a for-cause challenge violated the defendant's Sixth Amendment right to an impartial jury, even though the defendant used one of his peremptory challenges to remove the juror. 487 U.S. at 87-88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88. As noted above, the Court in *Ross* also concluded that requiring the defendant to use a peremptory challenge to remove a juror who should have been excused for cause did not deprive the defendant of his rights under the Due Process Clause, because state law required the defendant to take that action in order to appeal the trial court's denial of a for-cause challenge. *Id.* at 89-91. But it is not necessary to conclude that a qualification like the one recognized by the Court in *Ross* exists in federal law to reject the claim of a due process violation. An error in forcing a defendant to "waste" a peremptory challenge would deprive him only of a rule-based right to exercise that challenge, not of any right under the Constitution.

In unusual circumstances, the Court has held that the violation of a non-constitutional rule of procedure deprived an individual of due process. For example, the Court has held that the imposition of a sentence by a jury that was not informed of its discretion to impose a lower sentence deprived the defendant of due process, and not simply "of a procedural right of exclusively state concern." *Hicks* v. *Oklahoma*, 447 U.S. 343, 346-347 (1980). The Court has also found a due process violation when a State denied a hearing to a complainant,

based solely on an official's failure to comply with a state-law deadline for initiating an adjudication. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). But those cases bear no resemblance to the criminal procedure right at issue here. Unlike the law at issue in *Hicks*, Rule 24 defines a process for selecting a jury, not for instructing the sentencer on the extent of its discretion.[7] And unlike the situation in *Logan*, a defendant whose peremptory challenge rights are impaired retains his right to be tried by an impartial factfinder and to exercise full due process rights before being finally deprived of a protected liberty interest.

The court of appeals' holding that an impairment of the rule-based right to exercise peremptory challenges by itself works a due process violation is inconsistent with this Court's many holdings that violations of non-constitutional procedural rights provide no basis for federal habeas corpus relief. See *Estelle* v. *McGuire*, 502 U.S. at 67 ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'") (quoting *Lewis* v. *Jeffers*, 497 U.S. 764, 780 (1990)); *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Rose* v. *Hodges*, 423 U.S. 19, 21-22 (1975) (per curiam) (same). That principle would be seriously undermined, if not altogether elimi-

[7] The jury in *Hicks* was erroneously instructed that punishment must be assessed at 40 years' imprisonment, when state law authorized the jury to impose any sentence greater than ten years' imprisonment. 447 U.S. at 345-346. The defendant was thereby deprived of his opportunity to be heard by a factfinder that could give him "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Nothing of the kind can be said here; respondent enjoyed his full right to be heard in his criminal trial.

nated, if a violation of a criminal procedure right conferred by statute or rule alone were sufficient to establish a deprivation of liberty without due process of law. Under that analysis, due process claims could be brought on habeas corpus whenever a State violated its own evidentiary rules (*Estelle*), statutory appellate process (*Pulley*), or limits on commutation authority (*Hodges*). To accord constitutional protection to procedural rights voluntarily created by the government skews the basic purpose of due process, which is to guarantee fundamental fairness. That expansive view of the Due Process Clause cannot be sustained. As the Court has explained:

> We have long recognized that a "mere error of state law" is not a denial of due process. *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Ibid.*

Engle v. *Isaac*, 456 U.S. 107, 121 n.21 (1982).

Those principles support the conclusion that impairment of respondent's rights under the federal rule governing peremptory challenges does not per se violate the Constitution. See *Lane*, 474 U.S. at 446 n.8 (noting that the violation of Federal Rule of Criminal Procedure 8, governing joinder, "would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"). And, although respondent exercised one of his allotted peremptory challenges to remove a juror who should have been removed for cause, he does not contend that the jury that tried him was anything other than fair and impartial.

The range of discretion available to a judge in conducting jury selection, despite the potential for the judge's actions to affect the exercise of peremptory challenges, underscores that any impairment here did not render the trial fundamentally unfair. Legitimate limitations on voir dire may significantly affect the exercise of peremptory challenges, without raising any constitutional issue. See *Mu'min* v. *Virginia*, 500 U.S. 415, 424- 425 (1991); cf. *J.E.B.*, 511 U.S. at 143-144. Jury selection procedures necessarily constrain the exercise of peremptory challenges. See *Pointer* v. *United States*, *supra*; *St. Clair* v. *United States*, *supra*. Finally, peremptory challenges may not be used to discriminate on the basis of race, *Batson* v. *Kentucky*, 476 U.S. 79 (1986), or gender, *J.E.B.*, *supra*. See *Georgia* v. *McCollum*, *supra* (defense peremptory challenges are subject to *Batson* scrutiny).

Given these well-established limitations on the right to exercise peremptory challenges, the Due Process Clause is not violated simply because the defendant has had to exercise a peremptory challenge to remove a juror who should have been excused for cause. As Judge Rymer explained in dissent, "[t]o find a due process violation for 'effectively' denying or impairing [respondent's] 'right to the full complement of peremptory challenges to which he was entitled under federal law,' as the majority does, [at Pet. App. 9a], comes full circle by 'effectively' making the exercise of a peremptory challenge a *constitutional* right." Pet. App. 19a. Yet this Court has repeatedly held the opposite.

II. IMPAIRMENTS OF A DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES ARE SUBJECT TO HARMLESS ERROR ANALYSIS

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[8] "[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988); *Lane*, 474 U.S. at 444-449 & n.11.

In general, to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993); see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Even errors that violate important constitutional rights are generally subject to analysis under that test. *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999). Reversal for error without consideration of whether the defendant suffered case-specific prejudice is "the exception and not the rule." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). While a few errors are deemed "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect

---

[8] Similarly, Section 2111 of Title 28, United States Code, provides that, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

substantial rights') without regard to their effect on the outcome," *Neder*, 119 S. Ct. at 1833, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. Under those principles, even if it was error when respondent was required to use a peremptory challenge to strike the juror who should have been removed for cause, reversal is not required absent a showing of prejudice. The court of appeals' holding that the error demanded automatic reversal is incorrect and should be rejected.[9]

A. An Impairment Of Peremptory Challenges Is Harmless If An Impartial Jury Sits

Since this Court's decision in *Chapman* v. *California*, 386 U.S. 18 (1967), it has been clear that even errors that violate important constitutional rights are subject to review for harmlessness. Harmless-error analysis

[9] Harmless-error analysis applies whether the error in question is constitutional or statutory. When the error in question is of constitutional dimension, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Thus, the standard of harmless-error review in cases such as this one will turn on whether, assuming there is error, the Court finds a violation of statutory or constitutional rights. Our position is that no error occurred, but if the Court disagrees, it should find no more than a violation of rule-based rights, and should conduct harmless-error analysis under *Kotteakos*.

applies, for example, to improper comments on the defendant's failure to testify, *Chapman*, *supra*; to admission of a coerced confession, *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991); and to a violation of the Sixth Amendment's jury trial right by failing to instruct the jury on an element of the offense, *Neder* v. *United States*, 119 S. Ct. at 1833-1837. In only a handful of cases has the Court found that certain fundamental constitutional errors require reversal even if they have no effect on the outcome of trial proceedings. See, *e.g.*, *United States* v. *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose*, 478 U.S. at 577-578). Those instances of "structural error" include *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of trial counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Gomez* v. *United States*, 490 U.S. 858, 876 (1989) (jury selection before a magistrate lacking jurisdiction); and *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction). Similarly, the seating, over the defendant's objection, of an actually biased juror represents a form of error that is intrinsically harmful and that warrants reversal without any inquiry into case-specific prejudice. See, *e.g.*, *Rose*, 478 U.S. at 578; *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966); cf. *Morgan* v. *Illinois*, 504 U.S. 719, 726-727 (1992).

The error in this case differs significantly from those errors that have been found to "infect the entire trial process" and that "necessarily render a trial funda-

mentally unfair." *Neder*, 119 S. Ct. at 1833. Where no actually biased juror is seated, errors impairing the exercise of peremptory challenges do not deprive the defendant of an "impartial jury." At most, such errors deprive the defendant of the right to exclude a juror whom the defendant believes would be less favorable to him than some other juror. Such errors do not justify the conclusion that in each and every case the error affects "substantial rights," notwithstanding the defendant's representation by counsel and receipt of a fair trial before an impartial jury. Those errors, therefore, are not within the "very limited class" of "structural" errors. *Neder*, 119 S. Ct. at 1833.

Accordingly, the usual form of harmless-error inquiry applies in this case, under which an error does not affect the defendant's "substantial rights" unless it affects the outcome of the trial.[10] The error in this case cannot reasonably be said to have had any such effect. It would be purely speculative to conclude that the substitution of one impartial juror for some other impartial juror would have changed the trial's verdict. And it is not sufficient to note that the error "may have resulted in a jury panel different from that which would otherwise have decided the case." *Ross*, 487 U.S. at 87 (rejecting claim that jury selection error warranted reversal even if "the composition of the jury panel might have changed significantly"). The jury that sat was fair and impartial, and respondent had no right to a

[10] The government carries the burden to show harmlessness if a proper objection has been made in the district court; if the claim of error is forfeited, the defendant must show an effect on substantial rights under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993); *Johnson* v. *United States*, 520 U.S. 461, 465 (1997).

jury composed of particular jurors. See *Marchant*, 25 U.S. (12 Wheat.) at 482; *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975) ("Defendants are not entitled to a jury of any particular composition.").

This Court reached a similar conclusion in determining that an impairment of the exercise of peremptory challenges does not, without more, justify granting a new trial in a civil case. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984). In that case, a juror's failure to respond to a question on voir dire denied a party information that would have been useful in exercising a peremptory challenge. *Id.* at 549-552. Relying on Section 2111 of Title 28 and Federal Rule of Civil Procedure 61—a civil analogue to Rule 52(a)—the Court concluded that reversal would not be justified unless a correct response by the juror "would have provided a valid basis for a challenge for cause." 464 U.S. at 556. The Court recognized the importance of a full response on voir dire to the intelligent exercise of peremptory challenges: "hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." *Id.* at 554. But it concluded that "[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* at 553. Although *McDonough* is a civil case, its underlying principle is applicable here as well. Notwithstanding the importance of the right to exercise peremptory challenges, an impairment of that right does not warrant per se

reversal so long as the jury that actually sits is "impartial."[11]

B. A Rule Of Automatic Reversal Is Justified By Neither Precedent Nor Principle

In applying a rule of automatic reversal, the court of appeals relied heavily on this Court's statement in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) that a "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." See Pet. App. 9a-10a (quoting that language from *Swain*); see also *United States* v. *Annigoni*, 96 F.3d 1132, 1141 (9th Cir. 1996) (en banc) (same). The quoted language in *Swain*, however, was

[11] Several courts of appeals have held that an erroneous ruling on a for-cause challenge is harmless error when the defendant uses a peremptory challenge to "cure" that ruling, so long as the jury that actually sat in the case was not biased. See, *e.g.*, *United States* v. *Brooks*, 161 F.3d 1240, 1245 (10th Cir. 1998) (failure to rule correctly on for-cause challenge is harmless error where defendant exercises peremptory strike on challenged juror and "has not alleged that any of the jurors actually seated were biased"); *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997) (failure to strike for-cause not prejudicial error where defendant struck venire member with peremptory challenge and failed to meet "the burden of showing that the jury which did sit was biased"), cert. denied, 522 U.S. 1053 (1998); *United States* v. *Torres*, 960 F.2d 226, 228 (1st Cir. 1992) (Breyer, C.J.) (defendant's use of a peremptory to excuse juror who should have been excused for cause is harmless error, where defendant did not use up all peremptory challenges); but see, *e.g.*, *United States* v. *Broussard*, 987 F.2d 215, 221 (5th Cir. 1993) (erroneous denial of a peremptory challenge under *Batson* cannot be harmless error); *United States* v. *Ricks*, 776 F.2d 455, 461 (4th Cir. 1985) (right to peremptory of such significance that denial or substantial impairment of the right constitutes per se reversible error), cert. denied, 479 U.S. 1009 (1986).

unnecessary to the decision in that case.[12] As this Court has noted, "it is to the holdings of our cases, rather than their dicta, that we must attend." *Bennis* v. *Michigan*, 516 U.S. 442, 450-451 (1996) (brackets omitted); *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993) (finding that language in a prior decision "is obviously not controlling, coming as it did in an opinion that did not present the question we decide in these cases").

Not only is the statement in *Swain* dictum, but the authorities on which the Court relied do not provide controlling doctrine today. *Swain* relied on a series of early decisions from this Court reversing judgments, including criminal convictions, on the basis of errors impairing defendants' exercise of their peremptory challenges. 380 U.S. at 219 (citing *Harrison* v. *United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry.* v. *Shane*, 157 U.S. 348, 351 (1895); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).[13] Those cases,

[12] The relevant holding of *Swain* was that the Constitution does not require "an examination of the prosecutor's reasons for the exercise of his [peremptory] challenges in any given case" to determine whether the prosecutor had the impermissible purpose to remove black jurors on the basis of their race. 380 U.S. at 222. That holding was overruled by *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which the Court held that a prosecutor's purposeful discrimination on the basis of race in the exercise of peremptory challenges violates the Equal Protection Clause. See *id.* at 92-93 (rejecting *Swain* standards). Because *Swain* did not address any claim that a defendant had been denied a peremptory challenge right, the statement from *Swain* quoted in text (380 U.S. at 219) was dictum.

[13] In *Harrison*, the applicable statute required that the defendant be granted ten peremptory challenges, but he was granted only three. 163 U.S. at 141. In *Shane*, the statute required that a venire of 18 jurors qualified for cause be presented to the parties

however, were "decided long before the adoption of Federal Rule[] of Criminal Procedure * * * 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. § 2111." *Lane*, 474 U.S. at 444. In *Lane*, this Court declined to follow an early case holding that misjoinder of charges requires automatic reversal. *Ibid.* (noting that per se reversal approach of *McElroy* v. *United States*, 164 U.S. 76 (1896), did not survive later statutory harmless-error provisions). Similarly in this case, judicial rules generated in an era when trial error was presumptively reversible and reviewing courts were called "citadels of technicality," *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946), are no longer authoritative.

There is no basis for retaining the automatic-reversal rule as a matter of principle. It is undoubtedly true, as the Ninth Circuit has observed, that, "unlike typical trial errors, [an error involving a peremptory challenge does] not 'occur[] during the presentation of the case to the jury'"; thus, it "may not be 'quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *United States* v. *Annigoni*, 96 F.3d at 1144 (quoting *Arizona* v. *Fulminante*, 499 U.S. at 308) (emphasis omitted). But those observations underscore the reason why errors that impair the exercise of peremptory challenges are intrinsically less threatening to a defendant's rights than, for example,

---

for peremptory strikes, but the panel presented had only 12 jurors. 157 U.S. at 350-351. In *Lewis*, the trial court denied the defendant the right to be brought face-to-face with the venire before or during the exercise of peremptory challenges and thereby deprived him of information from which the challenges could be made. 146 U.S. at 375-376. In each case, the Court reversed without inquiring into whether there was any case-specific prejudice.

admission of a coerced confession, *Fulminante*, *supra*, or omission of an element from the jury instructions, *Neder*, *supra*. The impairment of a peremptory challenge restricts the defendant's "arbitrary and capricious" right to say that a juror will not sit, 4 William Blackstone, *Commentaries* *353, but it has no effect on the trial record or on the issues presented to the jury. The absence of those consequences is a reason to find a lack of prejudice to the defendant's fair trial rights, not to presume prejudice in all cases.

A defendant whose right to exercise peremptory challenges is impaired may suffer an injury to the intangible values sometimes said to be furthered by the challenge. See *Swain*, 380 U.S. at 219 (the right of peremptory challenge functions "to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise"). But a defendant's subjective belief that a particular juror, though properly qualified as impartial, may in fact be less favorable to him than another juror, is not a sufficient reason to overturn the results of an otherwise fair trial. Cf. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188, 191-192 (1981) (plurality opinion) (requiring, as a matter of supervisory authority over the federal courts, inquiry on voir dire into possible racial prejudice of jurors at the defendant's request, where the defendant and the victim are members of different racial or ethnic groups, in order to facilitate exercise of for-cause and peremptory challenges; but concluding that no reversible error occurs unless there was a "reasonable possibility" that racial or ethnic prejudice influenced the jury). Retrials are not cost-free for society, witnesses, or victims. And "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."

Engle, 456 U.S. at 127-128. Those factors strongly counsel against upsetting the original verdict absent a denial of the fundamental elements of a fair trial or concrete prejudice to the defense. As the Court noted:

> These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

United States v. *Mechanik*, 475 U.S. 66, 72 (1986). A rule of automatic reversal thus bears a heavy burden of justification. See *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). The possible discomfort to the defendant resulting from the impairment of his rule-based peremptory challenges does not meet that test. Cf. *Morris* v. *Slappy*, 461 U.S. 1, 13-14 & n.6 (1983) (constitutional right to counsel does not guarantee a defendant "rapport with his attorney" or a "'meaningful' attorney-client relationship").

The costs of a rule of automatic reversal are magnified by the inevitability of errors in jury selection that may impair a defendant's intelligent exercise of his challenges. Jury selection is often fast-paced and conducted under pressure. A trial judge has complex responsibilities: the judge must ensure that parties have an adequate basis for making challenges, that claims of error (including allegations of discrimination in the use of peremptory challenges) are adjudicated promptly and fairly, and that impartial jurors are empaneled. If the selection is conducted properly, voir dire will flush out relevant information; jurors who are unqualified, biased, or incapable of following the law will be excused; and parties will exercise their peremptory challenges for whatever non-discriminatory reasons they may have. But experience shows that, despite the diligence of trial judges, jury selection will also produce a significant number of errors that, in retrospect, impair or deny the defendant's peremptory challenges. Given that reality, a rule of automatic reversal in every case is too high a price to pay.[14]

C. The Record Does Not Demonstrate Prejudice From Any Impairment Of Respondent's Peremptory Challenge Rights

Finally, even on the assumption that some impairments of the peremptory challenge right might warrant reversal notwithstanding the empaneling of a fair and impartial jury, the record in this case demonstrates that there was no violation of respondent's "substantial rights." At most, respondent was deprived of one of the ten peremptory challenges that he and his co-defendant might have used to select the initial 12-person jury.

---

[14] As noted above (note 6, *supra*), if the improper denial or impairment of a peremptory results in the seating of a juror who should have been excused for cause, sufficient prejudice is shown to justify reversal. There is no claim of that character here. In *Ross* this Court noted that "[n]o claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force [the defendant] to use his peremptory challenges to correct these errors [in ruling on for-cause strikes]." 487 U.S. at 91 n.5. Similarly, no claim is made in this case that the trial judge intentionally and repeatedly erred in denying for-cause challenges to compel respondent to use peremptory challenges to cure those errors. Accordingly, no question is presented here whether such an error might constitute prejudice warranting reversal. Nor is any question presented here whether, even if reversal were not justified in that setting, interlocutory appellate relief might be available to remedy the court's error.

Fed. R. Crim. P. 24(b) and (c) (defense is entitled to ten strikes to select trial jurors in a felony case and to one strike to select one or two alternate jurors). Even if respondent's strike of the one juror who should have been excused for cause is considered to have been "wasted," the defense still had a considerable opportunity to participate in jury selection through the exercise of peremptory challenges and did not suffer a substantial impairment of that right.

Moreover, the record affords no basis for concluding that the jury that ultimately decided this case would have been different even if the court had excused Gilbert for cause. Respondent never indicated to the district court that he was dissatisfied with the 12-person jury selected through the exercise of his initial nine peremptory strikes. Nor did respondent voice an objection to any of the jurors actually selected or indicate that, if he had been granted another peremptory challenge in selecting the original 12-juror panel, he would have excused another juror.[15]

---

[15] When juror Finck failed to appear as a member of the 12-person jury after the jury was selected, respondent did request that another strike be granted to each side to select a new juror who would leapfrog the alternate, Riley, and directly replace Finck on the 12-person panel. J.A. 185. Respondent offered that suggestion to permit the possibility that an Hispanic juror, Olivas, would be placed on the 12-person jury. *Ibid.* That request for a peremptory challenge, however, cannot do service for a claim that an originally selected trial juror would have been removed but for the strike "wasted" to remove juror Gilbert. Even if it could, that belated request for an additional peremptory challenge could not form the basis for a claim of prejudice. Respondent's desired use of the additional peremptory was not to remove an objectionable juror but to enhance the possibility of placing an Hispanic on the jury. Peremptory challenges, however, are not a means of selecting particular trial jurors, but of rejecting them. See *United States*

At a bare minimum, a showing of prejudice should require "some objection from the defendant after the exhaustion of his peremptory challenges." *Frank* v. *United States*, 42 F.2d 623, 631 (9th Cir. 1930). See also, *e.g.*, *id.* at 630-631 (citing numerous state cases); *Trotter* v. *State*, 576 So.2d 691, 692-693 (Fla. 1990); *Turro* v. *State*, 950 S.W.2d 390, 406 (Tex. App. 1997, pet. ref'd); *People* v. *Schafer*, 119 P. 920, 921 (Cal. 1911) ("It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed."). A requirement for a defendant to lodge some objection to the panel as selected is especially appropriate under Rule 24 in a case involving multiple defendants, because the district court is granted discretion by Rule 24(b) to grant additional peremptory challenges. Cf. *Lewis* v. *United States*, 146 U.S. at 378-379 ("It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes."). Accordingly, assuming that, despite the empaneling of a fair and impartial jury, an impairment of a defendant's right to exercise peremptory challenges might be found in some case to have affected his "substantial rights," a defendant

---

v. *Marchant*, 25 U.S. (12 Wheat.) at 482 ("The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him."). And to the extent that respondent specifically intended to exercise his challenge against a non-Hispanic on the basis of ethnicity, the challenge would appear to violate equal protection principles. Cf. *Hernandez* v. *New York*, 500 U.S. 352 (1991).

should at least have to indicate on the record during jury selection that he would have used a peremptory challenge in a specific manner. Because the present record contains no such indication, any error in jury selection should not result in reversal of respondent's conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAVID C. FREDERICK
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

AUGUST 1999

APPENDIX A

1. Section 2111 of Title 28 of the United States Code provides:

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Rule 24 of the Federal Rules of Criminal Procedure provides:

Rule 24. Trial Jurors

(a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and

the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

3. Rule 52 of the Federal Rules of Criminal Procedure provides:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX B

STATES THAT DECLINE TO TREAT AN ERRONEOUS DENIAL OF CHALLENGE FOR CAUSE AS REVERSIBLE ERROR WHEN THE CONTESTED JUROR WAS REMOVED BY DEFENDANT'S USE OF PEREMPTORY CHALLENGE

Pickens v. *State*, 783 S.W.2d 341, 345 (Ark.), cert. denied, 497 U.S. 1011 (1990)
People v. *Samayoa*, 938 P.2d 2, 20 (Cal. 1997), cert. denied, 522 U.S. 1125 (1998)
State v. *Pelletier*, 552 A.2d 805, 810 (Conn. 1989)
Dawson v. *State*, 581 A.2d 1078, 1093-1096 (Del. 1990), vacated on other grounds, 503 U.S. 159 (1992)
Sams v. *United States*, 721 A.2d 945, 951 (D.C. 1998), petition for cert. pending, No. 98-8712 (filed Mar. 10, 1999)
Trotter v. *State*, 576 So.2d 691, 693 (Fla. 1990)
State v. *Ramos*, 808 P.2d 1313, 1315 (Idaho 1991)
People v. *Robinson*, 701 N.E.2d 231, 241 (Ill. App. Ct. 1998)
Woolston v. *State*, 453 N.E.2d 965, 968 (Ind. 1983)
State v. *Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993)
State v. *Crawford*, 872 P.2d 293, 297-298 (Kan. 1994)
People v. *Lee*, 537 N.W.2d 233, 243 (Mich. Ct. App. 1995), appeal denied, 537 N.W.2d 233 (Mich. 1996)
State v. *Barlow*, 541 N.W.2d 309, 312 (Minn. 1995)
Chisolm v. *State*, 529 So.2d 635, 639 (Miss. 1988)
State v. *Deck*, No. 80821, 1999 WL 383067, at *9 (Mo. June 1, 1999) (by statutory command, see Mo. Ann. Stat. § 494.480.4 (West 1996))
Thompson v. *State*, 721 P.2d 1290, 1291 (Nev. 1986) (per curiam)

State v. *DiFrisco*, 645 A.2d 734, 751-754 (N.J. 1994), cert. denied, 516 U.S. 1129 (1996)
State v. *Tranby*, 437 N.W.2d 817, 824 (N.D.), cert. denied, 493 U.S. 841 (1989)
State v. *Broom*, 533 N.E.2d 682, 695 (Ohio 1988), cert. denied, 490 U.S. 1075 (1989)
Ross v. *Oklahoma*, 487 U.S. 81, 90 (1988)
State v. *Barone*, 969 P.2d 1013, 1018-1019 (Or. 1998), petition for cert. pending, No. 98-8406 (filed Mar. 10, 1999)
State v. *Barnville*, 445 A.2d 298, 301 (R.I. 1982)
State v. *Green*, 392 S.E.2d 157, 159-160 (S.C.), cert. denied, 498 U.S. 881 (1990)
State v. *Howell*, 868 S.W.2d 238, 248 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994)
Adanandus v. *State*, 866 S.W.2d 210, 220 (Tex. Crim. App. 1993), cert. denied, 510 U.S. 1215 (1994)
State v. *Baker*, 935 P.2d 503, 506 (Utah 1997)

STATES THAT TREAT AN ERRONEOUS DENIAL OF CHALLENGE FOR CAUSE AS REVERSIBLE ERROR EVEN THOUGH CONTESTED JUROR WAS REMOVED BY DEFENDANT'S USE OF PEREMPTORY CHALLENGE

State v. *Huerta*, 855 P.2d 776,781 (Ariz. 1993)
People v. *Macrander*, 828 P.2d 234, 244-246 (Colo. 1992)
State v. *Kauhi*, 948 P.2d 1036, 1041 (Haw. 1997)
Thomas v. *Commonwealth*, 864 S.W.2d 252, 259-260 (Ky. 1993), cert. denied, 510 U.S. 1177 (1994)
State v. *Cross*, 658 So.2d 683, 687-688 (La. 1995)
Booze v. *State*, 698 A.2d 1087, 1097 (Md. 1997)
Commonwealth v. *Auguste*, 605 N.E.2d 819, 823 (Mass. 1992)
State v. *DeVore*, 972 P.2d 816, 824 (Mont. 1998)

Fuson v. *State*, 735 P.2d 1138, 1140 (N.M. 1987)
State v. *Etzkorn*, 552 N.W.2d 824, 829 (S.D. 1996)
State v. *McQuesten*, 559 A.2d 685, 686 (Vt. 1989)
Scott v. *Commonwealth*, 339 S.E.2d 899, 900 (Va. Ct. App. 1986), aff'd, 353 S.E.2d 460 (Va. 1987)
State v. *Phillips*, 461 S.E.2d 75, 94 (W. Va. 1995)
State v. *Ramos*, 564 N.W.2d 328, 334 (Wis. 1997)
Munoz v. *State*, 849 P.2d 1299, 1302 (Wyo. 1993)

No. 98-1255

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ABEL MARTINEZ-SALAZAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

MICHAEL D. GORDON
Counsel of Record
RONALD P. RYCHLAK
Of Counsel
University of Mississippi
School of Law
University, MS 38655
(662) 232-6857
(662) 915-6842 (Fax)

QUESTION PRESENTED

Is a Defendant Entitled to Reversal of His Conviction When He Is Forced to Use a Peremptory Challenge to Remove an Unqualified Juror Whom the District Court Erroneously Failed to Remove for Cause, Where the Defendant Exhausted His Remaining Peremptory Challenges and Where There Is Strong Evidence That He Would Have Used the Erroneously Denied Challenge on Another Juror?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER

No. 98-1255

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner

v.

ABEL MARTINEZ-SALAZAR, Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

At the Respondent's *voir dire* proceeding, the district court submitted a form to all prospective jurors. J.A. 90-91. On the questionnaire, prospective Juror Gilbert wrote that "I would favor the prosecution." J.A. 131-132.

Later, the district court and counsel questioned Gilbert privately in chambers:

> THE COURT: On your questionnaire, you said in question number 8, the answer: "I would favor the prosecution."

> Is that– are you saying that you would not be able to listen to the evidence, and decide what happened, and follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?
>
> JUROR/GILBERT: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

Id.

Juror Gilbert remained adamant about his bias in the face of what the district court called the "important question":

> THE COURT: But, if you were the defendants charged with this crime, and all of the jurors on your case had your background and opinions, do you think you'd get a fair trial?
>
> JUROR/GILBERT: I think that's a difficult question. I don't think I know the answer to that.

J.A. 132.

Responding to a question posed by defense counsel, Juror Gilbert candidly observed that he "would probably be more favorable to the prosecution . . . [because] [y]ou assume people are on trial because they did something wrong." J.A. 133. The district court immediately stepped in:

> THE COURT: [Y]ou heard me out there when I started the trial. That's not the general

> proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption---of guilty. The presumption is the other way. That's the way our system.
>
> JUROR/GILBERT: I understand that in theory.

J.A. 133-134.

Gilbert was then excused and said nothing more. He never retreated from these statements; he never stated that he could be fair; and he never subsequently stated that he would follow the district court's instructions to the contrary. J.A. 132-134.

Respondent later challenged Gilbert for cause:

> MR. GARCIA: I would move to excuse him for cause, Your Honor, based on his bias towards prosecutors.
>
> THE COURT: Mr. Kirby.
>
> MR. KIRBY [Prosecutor]: Your Honor, although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly.

J.A. 162-163.

The district court denied the for-cause challenge indicating that the defense could challenge this juror

peremptorily. J.A. 163-164. Defense counsel then reminded the district court that Gilbert indicated "a disregard for Your Honor's instruction on the presumption of innocence." J.A. 163. Trusting the prosecutor's recollection of events, the district court again denied the for-cause challenge finding that Gilbert "came back and said yes that he would follow it and so forth." *Id.* The district court again indicated that if Gilbert was to be excluded from jury service, the defense would have to use a peremptory challenge. *Id.*

Respondent struck Gilbert peremptorily and subsequently exhausted all peremptory challenges. J.A. 180. Later that day, as the courtroom deputy clerk empaneled the petit jury, the parties discovered a petit-juror, Juror-Finck, missing. J.A. 184. Respondent's trial counsel then twice asked the district court to allow an additional peremptory challenge. J.A. 185-186. He observed that "the other advantage of doing that [permitting peremptory challenges]" would be to provide more minorities on the panel. J.A. *Id.* The district court denied the request. *Id.*

Respondent was convicted and he timely appealed his conviction. J.A. 25 & 32. At the court of appeals, the Government affirmatively conceded that Respondent's due-process rights would be violated if he were forced to expend a peremptory challenge to remove an unqualified juror. J.A. 43. The Government steadfastly maintained that the district court had not erred when it refused to strike Gilbert. *Id.*

The court of appeals reversed Respondent's conviction and held the district court erred in denying the for-cause challenge and the denial forced Respondent to exercise a peremptory challenge, violating procedural due-process rights. J.A. 43; United States v. Martinez-Salazar, 146 F.3d 653, 656-

58 (1998); United States' Petition for Certiorari, pp. 9a-15a.

The Government, for the first time, opposed the due-process arguments in a petition for rehearing and suggestion for rehearing en banc. J.A. 43. The court of appeals denied that petition. J.A. 43. The Government filed a Petition for Certiorari, observing that it had "retracted" its early concession regarding due process. United States' Petition for a Writ of Certiorari, p. 5.

SUMMARY OF ARGUMENT

I. The district court violated Respondent's right to the full use of all his peremptory challenges under Rule 24 of the Federal Rules of Criminal Procedure when the Respondent used a peremptory strike to remove an unqualified juror, whom the district court had erroneously failed to remove for cause. In Ross v. Oklahoma, 487 U.S. 81 (1988), this Court addressed Ross' claim that his due-process rights had been violated when the state trial court erroneously denied him a for-cause challenge. The Ross Court found no due-process violation because Ross received all that was due him under state law.

In sharp contrast to Ross, Respondent in this case did not receive what was due him under federal law. He received one less peremptory challenge than he was entitled to under Rule 24 of the Federal Rules of Criminal Procedure, due to the district court's error. The Government now proposes a new rule that would reduce the number of a defendant's peremptory challenges every time the district court erroneously denies a for-cause challenge. The Government asks this Court to judicially impose a requirement forcing the defendant to exercise a peremptory challenge, in order to preserve the right to a fair and impartial jury under the Sixth Amendment. Indeed, the

Government would have this Court take the rule one step further than what is presented in this case and force the defendant to exercise a peremptory challenge in order to preserve his rights to urge a Sixth-Amendment violation on appeal.

The Government's rationale for its proposed rule is unpersuasive. The Government argues that peremptory challenges have never been more than a tool for Sixth-Amendment compliance and that its proposed rule merely extends that principle. Other than *dicta*, the Government offers no meaningful support for this claim. Nor can it. The history and context of peremptory challenges demonstrate that Congress designed peremptory challenges to protect rights congruous with, but distinct from, the Sixth Amendment.

The Government's interpretation of Rule 24 at most raises an ambiguity, which must be resolved under the rule of lenity. Under that rule, the Court must look to everything that could possibly aid in its interpretation and resolve any ambiguity in favor of the accused. See, e.g., Chapman v. United States, 500 U.S. 453, 463 (1991); Smith v. United States, 360 U.S. 1 (1959); Fed. R. Crim. P. 24 (1999).

II. Having found that the district court denied Respondent his full complement of peremptory challenges, reversal is appropriate, whether or not the error is considered to be constitutional or, alternatively, a violation of Rule 24. In any event, the court of appeals' ruling that Respondent's due-process rights were violated is consistent with this Court's previous treatment of procedural due-process issues. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (state's failure to comply with its own procedure violated procedural-due process); Hicks v. Oklahoma, 447 U.S. 343 (1980) (defendant

had procedural due-process rights to expect compliance with a rule of criminal procedure); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979).

Congress has provided for the selection of a jury with the use of peremptory challenges. That jury ultimately determines the imposition of criminal punishment, and Respondent has a substantial and legitimate expectation that the district court will not arbitrarily deny him a jury chosen in accordance with that procedure. While there is no constitutional requirement to provide peremptory challenges, once they are provided, their administration must be fair. Stilson v. United States, 250 U.S. 583 (1919) (no substantive constitutional right to peremptory challenges); cf. Griffin v. Illinois, 351 U.S. 12, 24 (1956) (once the state gives the right to appeal, the government "can't bolt the door shut the door to equal justice.") Here, when the trial court forced the defendant to sacrifice a peremptory challenge to cure the trial court's error, it arbitrarily denied Respondent's Rule 24 right to a peremptory challenge, denying him due process. Cf. Ross, 487 U.S. at 89-91 (compliance with well- settled state law which required use of peremptory challenge to cure trial court error did not arbitrarily deny that right).

III. The court of appeals properly found that the error defied harmless-error review. Martinez-Salazar, *supra* at 658; United States' Petition for Certiorari, p. 8a (February 1999). The court of appeals followed this Court's guidance that held a denial of peremptory challenges falls within the limited class of errors that are not subject harmless-error review. Martinez-Salazar, at Id. (citing United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (citing Swain v. Alabama, 380 U.S. 202 (1965) (overruled on other grounds)). Following Swain and its progeny, the court of appeals applied a rule of "automatic reversal." Martinez-

Salazar, 146 F.3d at 658; United States' Petition for Certiorari, p. 14a-15a.

This Court has recently reaffirmed that there is a limited class of cases that defy harmless-error review. Neder v. United States, ___ U.S. ___, 119 S. Ct. 1827, 1833 (1999); see also United States v. Olano, 507 U.S. 725, 735 (1993); Chapman v. California, 386 U.S. 18 (1967). Under Swain and its progeny, the denial of peremptory challenges creates structural error because the harm cannot be measured in any meaningful way. See, e.g., Vasquez v. Hillery, 474 U.S. 254 (1986) (discrimination at Grand Jury); see also McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation); Strunk v. United States, 412 U.S. 434 (1973) (speedy trial); Chapman v. California, 386 U.S. at 23 ("structural errors" cannot be measured quantitatively, are not subject to harmless-error review and are to be distinguished from trial errors which are amenable to review). Supporting the logic of the court of appeals decision below is the fact that this Court has never searched for harmless error when addressing an abuse of peremptory challenges under the equal-protection clause. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Georgia v. McCollum, 505 U.S. 42 (1992); Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986).

Affirming the court of appeals' decision does not require this Court to find that the error was subject to an "automatic reversal" rule and, for that matter, there is no need to find that the error rose to constitutional dimensions. If this Court were to apply a harmless-error analysis, review may be made under two possible burdens of proof, either an assessment of the government's ability to demonstrate an absence of prejudice or its ability to demonstrate harmlessness beyond a reasonable doubt. Chapman v. California, *supra*. The result is the same

under either standard. Because the error involves peremptory challenges, the only possible measure in assessing harm or prejudice is to analyze whether the jury composition could have changed as a result of the error. Gray v. Mississippi, 481 U.S. 648 (1987).

Recognizing the near impossibility of proving harmlessness in this case, the Government would have this Court rule that the error is harmless if an impartial jury sits. In reality, of course, this is no test at all because, under such a test, a reviewing court would always find the error harmless---there could be no other choice. The error arose precisely because Respondent used his peremptory challenge to cure the trial court error in order to create an impartial jury.

Moreover, the Government's proposed analysis begs the question whose answer must focus on the true harm. The very nature of peremptory challenges permits removal of qualified jurors who otherwise satisfy the Sixth Amendment. Again, the harm lies in a change in jury composition. Gray, *supra*. Any other measurement ignores the unique and important role that peremptory challenges play on the otherwise qualified jury pool. Swain; Annigoni, 96 F.3d at 1144-45; Tucker, *Blackstone's Commentaries*, Book IV, Vol. V, p. 353 (1803) (published by Augustine M. Kelly, New York 1969) (hereinafter "Blackstone's Commentaries").

ARGUMENT

I. THE DISTRICT COURT'S ERRONEOUS DENIAL OF THE FOR-CAUSE CHALLENGE VIOLATED RULE 24.

In Ross v. Oklahoma, this Court addressed a two-prong

attack on the Oklahoma's state court's failure to exclude an unqualified death-penalty juror. Ross, 487 U.S. at 85-91. Like Respondent in this case, Ross exercised a peremptory challenge to remove the unqualified juror and then asserted a violation of his Fifth, Sixth and Fourteenth Amendment Rights. *Id.*

The Ross Court rejected the Sixth-Amendment claim, holding that there is no Sixth-Amendment violation "[s]o long as the jury that sits is impartial." Ross, 487 U.S. at 88. The Court also rejected Ross' due-process claim because Ross's right to a peremptory challenge was limited by Oklahoma state law which expressly directed the defendant to use peremptory challenges to cure trial court errors. Ross, 487 U.S. at 89-91 (citing Ferrell v. State, 475 P.2d 825 (Okla. Crim. App. 1970); Scott v. State, 538 P.2d 1061 (Okla. Crim. App. 1975); McDonald v. State, 15 P.2d 1092 (1932)).

This Court's decision does not answer the question before it today. This Court expressly left open the "broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if defendant uses one or more challenges to remove jurors who should have been excused for cause." Ross, 487 U.S. at 91, n.4.

The Government now claims that Rule 24 of the Federal Rules of Criminal Procedure requires the exercise of a peremptory challenge to cure a trial court's erroneous denial of for-cause challenges. The argument ignores the context and history of the rule. In any event, the argument at best, points out an ambiguity in Rule 24 that must be resolved in Respondent's favor.

A. Rule 24 Does Not Impose a Duty on the Defendant to Cure Trial court Errors.

This Court has stressed, in no uncertain terms, that peremptory challenges are designed, in part, to assure the appearance of fairness. Swain, 380 U.S. at 219 (peremptory challenges satisfy the rule that "justice must satisfy the appearance of justice") (citation omitted). In contrast to the Sixth Amendment, the peremptory-challenge rule provides for a subjectively fair jury. Holland v. Illinois, 493 U.S. 474, 481 (1990) (the parties have the right to "stack" the jury from an otherwise qualified jury pool). Requiring the defendant to cure trial court errors in order to preserve his right to a fair and impartial jury, at the expense of foregoing the right to remove others he perceives as unfair, undermines the core value of peremptory challenges. Such a rule would undeniably provide the very appearance of unfairness that the rules seeks to avoid.

The historical roots of, and this Court's discussion of, peremptory challenges teach that peremptory challenges serve as more than a tool for the Sixth Amendment's guarantee of an objectively fair and impartial jury. Rather, they permit removal of those jurors whom the defendant feels harbor prejudice against him but cannot successfully challenge for cause. Sir William Blackstone, contrasting for-cause challenges with peremptory challenges, observed that the rights to peremptory challenges were "necessary," because a defendant "should have a good opinion of his jury [and] . . . the law wills that he should not be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike." *Blackstones' Commentaries*, at 353. Historically, commentators have long recognized the integral part that peremptory challenges played in jury selection. *Id.*; see also

Hawkins, *A Treatise of the Pleas of the Crown*, Vol. II, Ch. XLIII (1721) (reproduced by Garland Publishing 1978); Pulton, *De Place Regis et Regini*, pp. 201-204 (1609) (reproduced by Garland Publishing 1978); Sr. Matthew Hale, *Historia Placitorum Coronae* ("A History of the Pleas of the Crown"), Vol. II, Ch. XXXV (1736) (reproduced by Professional Books Ltd. 1987).

Sir. William Blackstone's observations about the unique and important role served by peremptory challenges are correct today. If peremptory challenges were but a tool to remove unqualified jurors, there would be no need for peremptory challenges. After all, this Court has held that for-cause challenges adequately protect the defendant's Sixth-Amendment right to a fair trial and the Constitution requires no more. See, e.g, Stilson, *supra*.

In no instance does federal law, by rule or procedure, require that a defendant affirmatively forfeit such an important right in order to preserve a fundamental constitutional right. In the abstract, the idea is inconceivable. No rule should force a defendant to make that sacrifice because to do so offends traditional notions of fair play and justice. See, e.g., Ross, 487 U.S. at 97, (Marshall, J., dissenting) (citing United States v. Jackson, 390 U.S. 570 (1968) (striking statute that made death penalty available only to those who exercised their right to jury trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (striking statute that required a criminal defendant to testify first, if he wished to testify in his own behalf)).

That peremptory challenges serve a high purpose,

distinct from for cause challenges, is beyond refute.[1] This Court in Swain further explained:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. "For it is as Blackstone stays, an arbitrary and capricious right; and it must be exercised with full freedom or it fails of its full purpose."
>
> . . . .
>
> The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for real or imagined partiality that is less easily designated or demonstrable.

Swain, 380 U.S. at 219-220 (citations omitted); Holland, 493 U.S. at 484 (peremptory challenges are a "means of excluding extremes of partiality on both sides") (citing Swain, *supra).*

---

[1] Scholars agree. They too have observed that peremptory challenges are more than a tool to ensure Sixth Amendment compliance: "The peremptory challenge serves important functions: it (i) teaches the litigant and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense it belongs to the litigant' because 'he chose it' . . . [and] (iii) serves as a shield for the exercising of the challenge for cause." W. LaFave & A. Israel, *Criminal Procedure*, § 22.3, p. 978 (2nd ed.) (1992) (citations omitted) (hereinafter "Criminal Procedure").

The number of rights to peremptory challenges available under Rule 24 also reveals that Congress intended them to serve a purpose beyond the empaneling of a fair and impartial jury. The Rule provides the defendant an increasing number of peremptory challenges as the seriousness of the offense increases. Specifically, Rule 24 affords the defendant 20 peremptory challenges "if the charged offense is punishable by death" and 10 peremptory challenges "[i]f the offense is punishable by imprisonment of more than one year" and just 3 peremptory challenges if the offense is a misdemeanor. Unlike the number of peremptory challenges, the number of trial jurors to be selected in a criminal trial does not turn on the offense charged. Fed. R. Crim. P. 23 (1999). Obviously, Congress recognized that peremptory challenges are more than a vehicle that drives toward Sixth- Amendment compliance. Were that the case, the number peremptory challenges would remain the same regardless of the offense charged because the number of trial jurors is static.

Of course, the logical reason for the graduated number of peremptory challenges is the increased need for the subjective perception of fairness as criminal exposure rises. As the seriousness of the offense rises, public attention rises, and with it, the increased need for public and personal confidence in the fairness of the trial. See, e.g., Georgia v. McCollum, 505 U.S. 42, 57 (1992) ("The Court has recognized that 'the role of litigants in determining jury composition provides one reason for wide acceptance of the jury system and of its verdicts.'") (citation omitted); Powers v. Ohio, 499 U.S. at 413 ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (acknowledging a need for public confidence in the

criminal justice system); Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (same). Similarly, scholars have recognized that peremptory challenges instill confidence in the criminal justice system. See, e.g., Babcock, *Voir Dire Preserving Its Wonderful Power*, 27 Stan. L. Rev. 545, 551 (1975); Gobert, *The Peremptory Challenge- An Obituary*, 1989 Crim. L. Rev. 528, 552 (1989). In this regard, this Court's language in Swain is worth repeating: " [T]he peremptory satisfies the rule that to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 380 U.S. at 219.

B. The Rule of Lenity Requires Interpretation of Rule 24 in Favor of Respondent.

At most, Rule 24 is ambiguous on the question presented to the Court and must be interpreted in favor of the accused under the rule of lenity. The rule of lenity is to be applied "only after seizing everything from which aid can be derived." Reno v. Koray, 515 U.S. 50, 64-65 (1995) (quoting Moskal v. United States, 498 U.S. 103 (1990)) (interpreting whether pretrial detention includes time spent at a half-way house; rejecting the rule of lenity because congressional intent resolved the issue). This Court has held that there must be a "grievous ambiguity or uncertainty in the language and structure of the Act" before applying the rule. Chapman v United States, 500 U.S. at 463 (1991); see also Ratzlaf v. United States, 510 U.S. 135, 148 (1994) (observing that it would resolve any doubts about an ambiguous money-structuring statute's scienter requirement in favor of the accused). This Court has applied the rule of lenity to interpret the Federal Rules of Criminal Procedure as well. Smith, *supra* (interpreting Rule 7 of the Federal Rules of Criminal Procedure under the rule of lenity).

Congress passed the first statute authorizing peremptory challenges in 1790. The statute said nothing about imposing a duty on the defendant to correct trial court errors. 1 Stat. 119 (1790) (providing peremptory challenges in capital cases). Upon subsequent revisions, Congress again stated nothing about the issue raised before this Court. 17 Stat. 282 (1872) (providing peremptory challenges in non-capital cases); Fed. R. Crim. P. 24 (1999).

Similarly, the text of Rule 24 gives no hint as to whether the defendant must cure trial court error. Likewise, the legislative history appears to be silent on the mater. Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules*, §§ 24:2-24:4 (setting forth history of rule) (2nd ed.) (1986) (legislative history of Rule 24 is silent). While this Court has stated in passing over the years, that the purpose of peremptory challenges is to ensure an empaneling of a jury that complies with the Sixth Amendment, the Court has never offered any substantive analysis, never considered historical evidence to the contrary and never cited to legislative history to support the proposition that Congress intended that result. The Government's citation to *dicta* is unhelpful.[2] On the other

[2] As noted by the Government in its opening brief, this Court has held that "[i]t is to the holdings of our cases, rather than our *dicta*, that we must attend." Bennis v. Michigan, 516 U.S. 442, 450-51 (1996). The Government's citation to J.E.B., 511 U.S. at 137, n.7 is one such example. Likewise, where this Court used language describing the peremptory challenge it has done so casually, apparently never intending to hold that federal peremptory challenges serve no other purpose. For example, the Ross Court, using the language now favored by the Government, cited early decisions which examined peremptory challenges under state or territorial statutes, but did not address procedural-due-process issues or rule on the purpose of peremptory challenges. Ross, 487 U.S. at 88 (citing Hopt v. Utah, 120 U.S. 430, 436 (1887) (applying Utah territorial statute); Spies v. Illinois, 123 U.S. 131 (1887) (applying Illinois statute)). Similarly the Government's citation to this Court's decision in Fraizer v. United States, 335 U.S. 497, 505 (1949) is misplaced.

hand, this Court in Swain provided a tome supporting its proposition that peremptory challenges have a salutary effect on the appearance of justice. Swain, 380 U.S. at 202-220; Holland, 493 U.S. at 481-483.[3]

There is no support for an interpretation that Rule 24 requires that the defendant correct trial court errors. Such a finding denies the strong and unequivocal evidence to the contrary and the rule of lenity forbids it.

In Fraizer, the defendant challenged the composition of his jury, after his peremptory challenges helped create that very jury. The Court observed that the right to these challenges "of course, [is] to be exercised in the party's sole discretion and was so exercised here. . . . But the right is given in aid in the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist. It does not follow that by using the right as he pleases, he obtains the further right to repudiate the consequences of his own choice." *Id.* Indeed, the Court also observed that "the privilege affords protection *in addition to constitutional guarantees* . . . ." *Id.* at n. 11 (emphasis added).

[3] Even if one were to believe that peremptory challenges served only to guard the Sixth- Amendment right to a fair trial, an infringement on this right strikes at the very heart of the Sixth Amendment. Peremptory challenges may be used to remove those who harbor disqualifying prejudices otherwise insulated from an objective review under the Sixth Amendment. "A person's biases are best interpreted from the subjective perspective of the targeted party. . . The peremptory challenge by definition anticipates this dilemma." Note, *The Discriminationtory Effect of the "Color-Blind" Jury: Georgia v. McCollum, 112 S. Ct. 2348 (1992)*, 16 Ham. L. Rev. 975, 996 (1993). The forfeit of a peremptory risks a Sixth-Amendment violation even if all for-cause challenges were properly granted. *Id*, cf. Holland, 493 U.S. at 481-82.

C. The Government Proposes an Illegitimate Substantive Limitation on Peremptory Challenges.

The Government attempts to link this Court's earlier decisions that permit the imposition of administrative-procedural rules on peremptory challenges with its proposed substantive "rule" that would require defendants to forfeit their own peremptory challenges in order to cure trial court error. The Government cites to cases where the trial court applied statutory rules that administered peremptory challenges, but offers no support for its proposed rule that substantively reduces the number of challenges. Brief for the United States, pp. 18-19 (citing United States v. Marchant, 25 U.S. 480, 482 (1827) (one defendant's striking of juror acceptable to other permissible); Stilson, *supra* (statutory requirement that the defendant share peremptory challenges among co-defendants acceptable); Pointer v. United States, 151 U.S. 396, 410-412 (1894)(permitting the trial court to force simultaneous challenges even though the Government may strike the same juror noting the statute was not violated); St. Clair v. United States, 154 U.S. 134 (1894) (approving a statutory process by which peremptory challenges were exercised immediately following for-cause challenges)). In that regard, the Government easily dismisses cases from the same era reversing substantive limitations on the number of peremptory challenges. See, e.g., Harrison v. United States, 163 U.S. 140 (1896) (reversing conviction where defendant received fewer peremptory challenges than permitted by statute). That, of course, is the issue facing this Court.

Thus, the Government's argument misses the point of

these cases. In Marchant, the defendant may have had an acceptable juror removed, but there was no argument that an unacceptable one remained. The Court expressly observed that the peremptory challenge has long been held to be a right "to reject jurors" and that right was not violated by the administrative process. Marchant, 25 U.S. at 479.

In Pointer, the defendant de-selected his unacceptable jurors--- furthering the very purpose of peremptory challenges, spoken about in Marchant. The Court expressly noted that the defendant received the number of peremptory challenges permitted by law. Pointer, 151 U.S. at 411. Similarly, in St. Clair, *supra*, the only issue was in administering the order of challenges, as provided for under the statute, and there was no allegation that the defendant received anything less than what the rule permitting peremptory challenges provided. St. Clair, 154 U.S. at 147.

In Stilson, the Court rejected defendant's claim that the statutory requirement of sharing peremptory challenges violated his Sixth-Amendment right to a fair and impartial jury. There was no claim in Stilson that the defendant was procedurally denied anything that was otherwise due him under rule or statute. Stilson, 250 U.S. at 587. In fact, there could be no such claim because, like St. Clair, the statute provided for that very results attained. *Id.*

Ultimately, the Government overlooks that it proposed a substantive limitation, on peremptory challenges, not provided for by Rule 24. Stilson, Marchant, Pointer and St. Clair addressed the administration of peremptory challenges, most of which were imposed by statute. In contrast, the Government seeks a judicially imposed, arbitrary deprivation of peremptory challenges, to cure erroneous trial court denials of for-cause

challenges. This Court has only reluctantly applied substantive limitations on the right to freely exercise peremptory challenges and has only done so where the free exercise of the peremptory challenge violates the equal-protection clause. Batson, *supra*; Powers, *supra*; McCollum, *supra*; J.E.B., *supra*. The Court recently refused to substantively limit peremptory challenges under the Sixth Amendment. Holland, *supra*. This Court has also held that the trial court's power to administer criminal rules of procedure is limited and the administration cannot conflict substantively with the Rule of Procedure. Carlisle v. United States, 517 U.S. 416 (1996) (court may not grant untimely judgment of acquittal under supervisory powers); cf. Jones v. United States, ___ U.S. ___, 119 S. Ct. 2090, 2099 (1999) (refusing to invoke supervisory powers to impose jury instruction under Federal Death Penalty Act because "Congress chose not to require such an instruction").

Additionally, the Government's proposed substantive rule is fraught with risk because it converts a substantial right with a remedy into one without a remedy. The proposed rule invites the prosecutor to routinely oppose a defendant's for-cause challenges, knowing that the defendant will bear the burden of the trial court error.

The Government's proposed rule also relieves the district court of its duty to carefully scrutinize such challenges. In fact, the rule gives the district court the incentive to err on the side of denying for-cause challenges.[4] Annigoni, 96 F.3d at 1146.

---

[4] In addition to the court's incentive to streamline the process, the district court must always maintain a proper number of potential jurors or risk a violation of the Jury Selection Act. 28 U.S.C. § 1866 (1994); see also United States v. Kennedy, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865 (1977).

A district court's decision of for-cause challenges is already reviewed under a very liberal abuse-of-discretion standard, Wainright v. Witt, 469 U.S. 412, 424 (1985), and there is no need to provide further appellate insulation. Under the Government's proposed rule, the district court must make at least 11 errors, each subsequently cured by the defendant, before its decision may be reviewed. It is only at that point, that the defendant can no longer guard against a Sixth-Amendment violation. Ross, *supra*.

Finally, the proposed rule diverts the district court's attention away from the important role of jury selection at the trial. That process has deservedly received much attention because of the gamesmanship. Batson, *supra*. Appellate insulation will permit overzealousness to continue, but this time, from a continuous flow of objections to legitimate for-cause challenges made with the comfort of knowing that the effect of mistakes are to be borne by the defendant. If anyone questions whether gamesmanship can be an issue, one need only look at Batson and its progeny. Adversarial overzealousness is a real risk and cannot be so easily dismissed. Cf. Ross, 487 U.S. at 92, n.5 (district court's deliberate misapplication of law in order to force defendant to use peremptory challenge raises different concerns).[5]

---

[5] In this case, the district court apparently relied on the prosecutor's characterization of Juror Gilbert's colloquy, finding that Gilbert had "come back and said yes he would follow it and so forth." J.A. 163; see also Martinez-Salazar, 146 F.3d at 656; United States' Petition for a Writ of Certiorari, p. 8a (February 1999) (observing that the prosecutor's remarks were unsupported by the record). But, both defense counsel had insisted that Gilbert had demonstrated bias. J.A. 162-163. While not argued here, in other cases, an inference can be drawn that the prosecutor acted deliberately to force a defendant to use peremptory strikes. The specter of such conduct demonstrates why it is so dangerous to insulate for-cause challenges from appellate review.

In the final analysis, the district court denied a for-cause challenge and forced Respondent to sacrifice a peremptory challenge to save himself from an unfair and impartial jury. There is and was no rule, whose interpretation remotely suggests that Respondent should bear the burden of that error. Neither Rule 24 nor its history suggests that Congress ever intended that result.

II. THE SUBSTANTIAL IMPAIRMENT OF PEREMPTORY CHALLENGES VIOLATED DUE PROCESS.

Respondent's due-process rights are directly implicated when the district court abuses its discretion and arbitrarily denies a for-cause challenge, forcing the defendant to exercise a peremptory challenge in order to remove an unqualified juror.[6] This Court observed in Ross that the state trial court's erroneous denial of a for-cause challenge, resulting in one fewer peremptory challenge, was not arbitrary because state law required him to cure trial court errors. Cf. Ross, 487 U.S. 88-91.

---

[6] A procedural due-process violation only occurs upon a substantial impairment of an important procedural right. See, e.g. Hicks, *supra*. Additionally, there must be an arbitrary denial of the right. *Id*. Moreover, the states, like Oklahoma, are free to limit the right in the way proposed by the Government. See Ross, 487 U.S. at 81. Accordingly, the Government's parade of horribles raised in habeas corpus, ought to be disregarded. Moreover, where peremptory challenges are concerned, a substantial impairment requires the defendant to have exhausted his peremptory challenges demonstrating that a challenge was in fact denied. See, e.g. United States v. Love, 134 F.3d 595 (4th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 2332 (1998); cf. McDonough Power Equipment, 464 U.S. 548, 555 (1984) (civil case) (directing trial court on remand that error with respect potential juror misconduct during *voir dire* is to be analyzed only in terms of whether it had an effect on for-cause challenges).

As previously noted, federal law has never imposed on the defendant the duty of forfeiting peremptory challenges to correct trial court errors. Federal peremptory challenges, in the United States, have been in existence for approximately 209 years. 1 Stat. 119 (1790). While Congress has changed the number of challenges available and has incorporated the right to peremptory challenges into the Federal Rules of Criminal Procedure, it has never considered or imposed such a rule. The district court's arbitrary denial of a peremptory challenge, otherwise guaranteed by Congress, therefore denied Respondent due process.

The Government goes to great lengths to attempt to demonstrate that due-process rights do not attach, in an effort to lower the standard of harmless error review. Brief for the United States, pp. 22-25; Olano, *supra*; Chapman v. California, *supra*. The Government however waived this argument by conceding the issue at the court of appeals. See Argument § III(B), *infra*. Nonetheless, the correct analysis is far more straightforward and demonstrates that a violation of Rule 24 is a procedural due-process violation.

The due-process clause applies where liberty or property interests are at stake and ". . . when a person [has] more than an abstract need or desire for an [important procedural right]. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it" and the right must not be denied arbitrarily. Greenholtz, *supra*; Logan, *supra*; see also Hicks, *supra*; cf. Ross, 487 U.S. at 89-90 (observing that judicial compliance with settled Oklahoma law was not arbitrary); cf. Griffin, 351 U.S. at 24 (once the state gives the right to appeal, the government "can't bolt the door shut the door to equal justice.").

This Court's decision in Logan illustrates the due-process principle involved because it persuasively demonstrates that a substantial violation of an important procedural rule violates due process. In Logan, the plaintiff sued under Illinois' Fair Employment Practices Act ("FEPA") for an employment-discrimination claim. Logan, 455 U.S. at 422. After a local administrator erroneously failed to set a hearing in a timely manner, his FEPA claim was statutorily cut off. *Id.* This Court held that the plaintiff had more than an "abstract desire or interest" in FEPA's procedure but had a procedural due-process "right guaranteed by the State." *Id.* at 431.

Likewise, Respondent has more than an abstract "desire"for adherence to the procedural mechanisms attendant with jury selection. Like Logan, Respondent arbitrarily lost an important right because of governmental error and he had a legitimate expectation, grounded in statute, to that important right. Specifically, Rule 24 provided for the loss of his liberty interest only after a trial where the jury was selected through the use of 10 peremptory challenges. Fed. R. Crim. P. 24 (1993). There was no established procedure to the contrary. The right is "essential." Swain, 380 U.S. at 220; see generally Holland, 493 U.S. at 481-83. The district court's erroneous denial of the for-cause challenge, forcing the Respondent to forfeit his rights under Rule 24, is no less arbitrary and no less important than those rights addressed in Logan. Cf. Ross at *Id.* Indeed, given the liberty interest at stake and the crucial role peremptory challenges play, the procedural right is more important.

Even if due process is implicated only where the fundamental fairness of the trial is infected, as suggested by the government, United States v. Lane, 474 U.S. 438, n.8 (1985), a denial of a peremptory challenge meets the mark. This Court, long ago, recognized that peremptory challenges are critical and

"that the fairness of trial by jury requires no less." Swain, 380 U.S. at 221.

That peremptory challenges are essential to a fair trial is no less true today than it was in 1965 or 1790. They provide the defendant with the subjective fairness because he "owns" the jury and must live with the jury's verdict. *Criminal Procedure*, at *id.* Peremptory challenges ferret out prejudices otherwise shielded through the objective test employed by the Sixth Amendment. *Id.* They also provide the defendant and the community with the necessary confidence in the verdict. *Id.*

In the end, peremptory challenges have enjoyed and continue to enjoy a great respect due to their "venerable" tradition and the important role they play in giving a defendant a fair trial. Holland, 493 U.S. at 481. Peremptory challenges were, after all, enacted by the same Congress that passed the Bill of Rights, and this Court recently offered even more praise, noting that given the long history of peremptory challenges, the "term constitutional phrase 'impartial jury' must surely take its content from this unbroken tradition.'" Holland, at *id.* Whether analyzed under Logan or Lane, the arbitrary and substantial denial of Respondent's peremptory challenge constituted a deprivation of his due-process rights.

III. THE HARMLESS-ERROR RULE DOES NOT APPLY.

This Court has observed that most constitutional errors are subject to a harmless-error analysis. Neder v. United States, 119 S. Ct. at 1833. In Neder, this Court also reiterated the "strong presumption" that, if the defendant had counsel and a "fairly selected, impartial jury" the error is subject to a harmless-error analysis. *Id.* at 1833-34.

Structural errors present a different, albeit limited, class of cases. *Id.* (citing Johnson v. United States, 520 U.S. 461, 468 (1997)). These errors "defy harmless-error" review and are subject to automatic reversal. Neder, 119 S. Ct. at *id.* While the jurisprudence does not support an absolute rule dividing structural from trial errors, the rule is useful. Annigoni, 96 F.3d at 1143 (citing Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)) (observing that this Court has described the divergence as a "spectrum"). A structural error ordinarily affects "the framework in which the trial proceeds rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

Trial errors, on the other hand, are to be reversed when the government cannot prove an absence of prejudice. Chapman v. California, *supra.* This standard, of course, will apply here, should the Court determine that the violation of Rule 24 did not violate Respondent's due-process rights. *Id.* In other words, violation of Rule 24 alone provides a basis for reversal where, as here, the government cannot prove the absence of prejudice.

In any event, the question of whether the harmless-error doctrine applies, and under what burden, does not control the outcome in this case. Whether deemed "structural error," "constitutional error" or simply a violation of Rule 24, this Court should affirm the court of appeals because the Government cannot meet its burden. Each of the circumstances is now addressed in turn.

A. The Substantial Impairment of A Peremptory Challenge Defies Harmless-Error Review.

A denial of peremptory challenges fits squarely within the doctrine of structural error because its defect lies in the trial framework not in what happens during the trial. Rule 24 provides the defendant with the framework for jury selection. Combined with for-cause challenges, the peremptory-challenges work in concert to produce a "fairly selected" jury. Neder, 119 S. Ct. at 1834. They provide a defendant with an objectively and subjectively fair and impartial jury. The peremptory challenge is a "structural" tool because an erroneous deprivation "may [not] be quantitatively assessed in the context of other evidence presented." Brecht, 507 U.S. at 629.

This Court long ago lauded the essential nature of peremptory challenges in jury selection, observing the important role it played in structuring the jury:

> The persistence of peremptory challenges and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. Lewis v. United States, 146 U.S. 370, 376, 36 L.Ed. 1011, 1014, 13 S. Ct. 136. Although 'there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,' Stilson v. United States, 250 U.S. 583, 586, 63 L.Ed 1154, 1156, 40 S. Ct. 28, nonetheless the challenge is 'one of the most important of the rights secured to the accused,'

> Pointer v. United States, 151 U.S. 396, 408, 38 L.Ed 208, 214, 14 S. Ct. 410. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S. Ct. 136; Harrison v. United States, 163 U.S. 140, 41 L.Ed. 104, 16 S. Ct. 961; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 39 L.Ed 727, 15 S. Ct. 641.

Swain, 380 U.S. at 219 (citations original). While this Court acknowledged that it has ruled otherwise, this Court recently observed that the right to peremptory challenges is so vital that one could plausibly argue that the Constitution requires them. Holland, 493 U.S. at 482.

Under Swain and its progeny, the fundamental importance that peremptory challenges play in the trial process and the automatic reversibility that flows from the substantial impairment of peremptory challenges, appears beyond reproach. The Government, of course, disagrees and argues that the analysis set forth in this Court's decision in United States v. Lane, *supra*, changes Swain. The Government is, however, incorrect because Lane in fact strengthens the premise that Swain has continuing vitality.

In Lane, this Court addressed a claim of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure. The Court applied a harmless-error analysis notwithstanding earlier decisions that held misjoinder to be reversible per se.

The Lane Court's decision rested on two premises. First, it relied on earlier decisions that suggested that the harmless-error doctrine did in fact apply to cases presenting issues similar

to misjoinder. Lane, 474 U.S. at 446-448 ("A plain reading of these cases shows they dictate our holding"). The Court reasoned that application of the harmless-error doctrine to analogous cases permitted an extension to misjoinder. *Id.*

Second, the Court observed that Rule 52 and Rule 8 of the Federal Rules of Criminal procedure did not exist when decisions involving the per se-reversal rule existed. Lane, 474 U.S. at 444. The Court concluded that the subsequent enactment of those rules, combined with Congressional enactment of 28 U.S.C. § 2111 (addressing harmless error) required a different result. *Id.*

Addressing the continuing vitality of Swain, this Court is faced with factors directly countervailing those present in Lane. This Court has consistently cited Swain as its starting point for peremptory-challenge analysis, noting the important role of peremptory challenges in fair-jury selection . See, e.g., Batson, 476 U.S. at 84 & 98; Holland, 493 U.S. at 480-82; Powers, 499 U.S. at 404; McCollum, 505 U.S. at 47 (starting point). Notably, the Court has never applied a harmless-error analysis when addressing error associated with the exercise of peremptory challenges. *Id.*[7]

Moreover, both Rule 24 and Rule 52 existed at the time

---

[7] This Court's decision in Powers underscores the inappropriateness of a harmless-error analysis. In Powers this Court held that defendant need not be of the same race than a juror excluded because of race, in order to allege an equal-protection violation. (There was no allegation that Mr. Powers' Sixth amendment rights were violated because a fair and impartial jury sat and the Sixth Amendment required no more. Holland, *supra*.) Still, this Court reversed the conviction, observing that when there are legitimate doubts that the jury has been chosen by proper means, the composition of the trier of fact is called in question and "the irregularity may pervade all the proceedings that follow." Powers, 499 U.S. at 412.

this Court decided Swain. Indeed, Rule 52 has remained largely unchanged since its adoption in 1944. Unlike the circumstances in Lane, the Swain Court had Rule 52 before it, when it re-enunciated that principle that the erroneous impairment of peremptory challenges are reversible per se.[8] This Court's decision in Lane, *supra*, therefore, adds no support to the Government's argument. Lane, in fact, undermines it.[9]

---

[8] It should have surprised no one that the courts held peremptory challenges in the highest regard. Swain, 380 U.S. at 212-221 (describing its widespread and long-held acceptance). The Swain Court's language, endorsing the protection of peremptory challenges from harmless-error review, was hardly earth-breaking.

If this Court's perennial endorsement of peremptory challenges and its repeated language that its impairment required automatic reversal were objectionable to Congress, Congress could have spoken and had much opportunity to do so. Congress amended Rule 24 in 1966 and 1987. Congress also addressed Rule 24 in 1997, but did not amend it. Fed. R. Crim. P. 24, *Advisory Committee Notes*. In the intervening 39 years since Swain, Congress chose not to amend Rule 24.

That Congress addressed Rule 24 is important in its proper interpretation. Congress is presumed to be aware of judicial interpretation when it re-enacts a statute without change. See, e.g., United States v. Mitchell, 39 F.3d 465, 469(4th Cir.), cert. denied, 515 U.S. 1142 (1995). This Court spoke to the issue of automatic reversal and Congress did not see fit to change it when it subsequently amended Rule 24. This Court should not do so now.

[9] Most of the federal courts that have directly addressed the issue have concluded that where substantial impairment of the right to peremptory challenges occurs, it is not subject to harmless-error review. United States v. Serino, 163 F.3d 91 (1st Cir. 1998); United States v. Taylor, 92 F.3d 1313 (2nd Cir.), cert. denied, 519 U.S. 1093 (1997); Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir.), cert. denied 516 U.S. 1145 (1996); Knox v. Collins, 928 F.2d 657 (5th Cir. 1991); United States v. Underwood, 122 F.3d 389 (7th Cir.), cert. denied, 118 S. Ct. 2341 (1998); Annigoni, *supra*. There is *dicta* to the contrary. See, e.g., Brief for the Respondent in Opposition to the United States' Petition for Certiorari, p. 14.

B. If The Harmless-Error Doctrine Applies, the Government Cannot Meet Its Burden.

Assuming *arguendo* that harmless error applies, if this is a violation of due process, the Government must prove harmlessness, beyond a reasonable doubt. Chapman v. California, *supra*. If the error is non-constitutional, the government must prove that harm was not prejudicial. *Id.*

Under either standard, the Government cannot meet its burden.

1. The Government Must Prove Harmlessness Beyond a Reasonable Doubt.

If the substantial impairment of peremptory challenges is a constitutional violation, the Government must prove harmlessness beyond a reasonable doubt. Chapman v. California, *supra*; see also Argument, II *supra*. The Government's argument to the contrary ignores that it has already affirmatively conceded and thereby waived this issue.

On April 24, 1995, the court of appeals ordered that the parties file supplemental briefs on the issue presented to this Court. J.A. 38. On June 29, 1995, the Government filed its supplemental brief and conceded that the denial of a peremptory challenge to which defendant was entitled would violate due process where defendant was forced to exercise the challenge against a juror who should have been excused for cause. J.A.

39; United States' Petition for Certiorari, p.5, n.1 (citing United States' Supplemental Brief, pp. 9-12). The Government reasserted the concession at oral argument on the issue before the court of appeals but retracted it after it the court of appeals issued its decision. Martinez-Salazar, 146 F.3d at n.3; United States' Petition for a Writ of Certiorari, p. 9a.

This Court will not ordinarily consider newly raised issues. Cf. Jones, 119 S. Ct. at 2117-2118 (Ginsburg, J., dissenting) (citing Roberts v. Galen of Va., Inc., 525 U.S. 249, 253 (1999) (per curiam) (addressing whether Government waived issue in briefing process before the Court). There is no good reason why the Government should be allowed to assert an argument that it conceded below. The Government did not contest and therefore did not brief the due-process issue before the court of appeals. The court of appeals did not have the full benefit of the adversarial process. Moreover, it should be clear that the argument is not a "predicate to an intelligent resolution of the question presented." *Id.* While the Government now disputes the due-process issue, its previous position reflects that its resolution is unnecessary in this case.

Still, other factors warrant this Court's refusal to consider the waived issue. First, the due-process issue is not one of national importance that often recurs. In fact, the controversy between Respondent and the Government, raising due-process error, is one that infrequently occurs, and when it does, there is general uniformity in the decision. See n. 9, *supra*. So rare are these cases, the Government and the Respondent have appeared to identify all federal cases and their number is quite low. Moreover, it is not likely to come up often because the liberal standard-of-review accorded the trial courts when reviewing for-cause challenges filters out most of the due-process issues.

The Government's concession also raises a parity issue. Where defendants' rights are involved, this Court recently observed that "[n]o procedural principle is more familiar to this Court than that a 'constitutional right' *or a right of any sort*, may be forfeited . . . ." Olano, 507 U.S. at 731 (emphasis added). But this is not mere forfeiture. It is waiver and "[w]aiver is different from forfeiture." *Id.* Whereas forfeiture is the failure to make a timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Id.* at 733. The latter almost certainly extinguishes the right. *Id.*

The Government gave up the right to press the issue. The Government should be held to no lower standard than a defendant. For that reason, this Court should hold that the Government's due-process argument is waived and the appropriate consequences should follow, namely that it must prove harmlessness beyond a reasonable doubt. Olano, *supra*.

2. *Under Any Standard, the Government Cannot Prove Harmlessness.*

Under any measure of harmlessness, the government cannot meet its burden under Rule 52. Harmless error, when measuring a denial of peremptory challenges, requires some attempt to assess the compositional change of the jury resulting from the error.

Instead, the Government argues that its burden ought to be satisfied when it demonstrates that a fair and impartial jury sat. See Brief for the United States, pp. 28-32. The argument misapplies Sixth amendment doctrine to the issue. In fact, the Government's proposed measure of harmlessness mirrors the Sixth amendment language in Ross. But, this Court in Ross

never purported to provide a standard by which harmlessness may be measured. The Court did not cite Rule 52 and did not refer to Title 28, section 2111. Both are essential elements of a decision addressing harmless error. Chapman v. California, *supra*.

Instead, this Court in Ross held, very logically, that under the Sixth Amendment "no violation of the petitioner's right to an impartial jury occurred" so long as an impartial jury sits. Ross, 487 U.S. at 88. The holding is about the nature of the error not about the nature of the harm. It is not a rule that measures harmless error at all.

Harm must be measured in terms of the procedural right violated. Peremptory challenges, by their very nature, must be exercised on an otherwise qualified jury panel. What then is the harm? A substantial impairment of a peremptory challenge harms the defendant when it changes the composition of that panel. This Court's holding in Gray v. Mississippi, *supra*, is instructive. In Gray, this Court addressed whether the trial court's erroneous exclusion of a qualified death-penalty juror required automatic reversal under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainright v. Witt, 469 U.S. 412 (1985) (collectively referred to as the "Witherspoon-Witt" exclusion). Gray, 481 U.S. at 650-658. Under the Witherspoon-Witt exclusion, jurors opposed to the death penalty may not be stricken for cause simply because they oppose it, but they may be peremptorily stricken by the prosecution nonetheless. Gray, *supra*. The removal of these jurors for cause, violates the defendant's Sixth amendment right to a fair-cross section of the community. *Id.*

In Gray, the trial court erroneously denied several for-

cause challenges made on behalf of the State, and the State exhausted its peremptory challenges. Gray, 481 U.S. at 650-658. Subsequently, the State asked for an additional peremptory challenge to strike an otherwise death-qualified juror because she opposed the death penalty. *Id.* Rather than permit the State any additional peremptory challenges, as the State had requested, the trial court struck the qualified juror, violating Witherspoon-Witt. *Id.*

This Court rejected the State's argument that the error was harmless. This Court reversed despite the fact that the State had asked for the additional peremptory challenge to strike the very juror in question.

The Court properly refused to attempt to reconstruct the jury-selection process in an attempt to measure the harm. "[T]he relevant inquiry," noted this Court in Gray, "is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error." Gray, 481 U.S. at 665 (citations omitted). In the context of the peremptory challenges, there can be no other way.[10] This Court explained why:

> Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the

---

[10] In Ross, this Court, while addressing the Sixth Amendment claim, limited the holding in Gray to the unique facts before it, namely the measure of harm that attends the exclusion of a death-qualified juror. But, this Court in Ross never reached the "harm" issue associated with the alleged due process violation because no violation was found. Ross, 487 U.S. at 88. Accordingly, the Court's limiting language in Gray is best understood as rejecting the Gray measurement under the Sixth Amendment, when the defendant admittedly received a fair and impartial jury. *Id.* A return to the Gray measurement of harm is appropriate because the erroneous denial of a peremptory challenge, whether called a due-process violation or a statutory violation, precluded the seating of the next qualified juror on the jury list.

> number of peremptory challenges remaining for counsel's use clearly affects the exercise of those challenges. A prosecutor with few peremptory challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories . . . The nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless.

Gray, 481 U.S. at 667 (emphasis added).

Were it any other way, appellate courts would be left the daunting, if not impossible, task of reconstructing a lawyer's likely or unlikely use of peremptory challenges on a particular juror. The exercise of peremptory challenges, as this Court noted in Gray, depends on a host of intangibles, including how many peremptory challenges are left and certainly on what jurors have survived for-cause challenges. Moreover, because peremptory challenges necessarily involve the de-selection of qualified jurors, appellate courts attempting to measure harm would need to embark upon an analysis of the effect of excluding a juror who never sat. Traditional harmless-error analysis is therefore impossible. The Ninth Circuit Court of Appeals was absolutely correct when it stated that "[t]o apply harmless-error analysis in this context would be to misapprehend the very nature of peremptory challenges." Annigoni, 96 F.3d at 1144.

Thus, like the defendant in Gray, the jury-selection process in this case defies any attempt to measure harm traditionally. Like Gray, the controversy is animated by the inability to reconstruct the peremptory-challenge process. Moreover, Respondent's exhaustion of peremptory challenges

and his request for an additional peremptory challenge when the opportunity arose defeat any argument that the Government can prove that jury composition would have been the same.

Failing that argument, the Government suggests that Respondent should have asked for an additional peremptory challenge, at the time the for-cause challenge was denied in order to somehow give the district court one last opportunity to cure its error. Brief for the United States, pp. 38-39. The argument is bewildering. The Government does not argue that the district court was on anything less than clear notice of the Respondent's objection to the for-cause denial.

Indeed, immediately following the district court's denial of the for-cause challenge, the district court ordered the defense to strike Gilbert peremptorily if he wished to remove him. J.A. 163. Still hoping to save the challenge, the Defense interrupted and reminded the judge that Gilbert had just indicated a "disregard" for the district court's instructions. J.A. 163. The judge reaffirmed his denial of the for-cause challenge and repeated that a peremptory strike should be used, if Gilbert was to be removed. J.A. 163 (The district court responded that "you know—about him and you can do what you wish with him . . . .") J.A. 163. To have then asked for an additional peremptory challenge would be to ask for something just expressly denied.

Interestingly, the Government cites one lone federal case (along with other state cases) to support a corollary claim that Respondent should have demonstrated dissatisfaction with the ultimate jury panel. Brief for the United States, p. 39 (citing

Frank v. United States, 42 F.2d 623 (9th Cir. 1930)).[11] Even if Frank and the other state court decisions carried weight, in this case Respondent expressly asked for an additional peremptory challenge after the petit jury was called. There could be no clearer expression of dissatisfaction with the panel and a desire for compositional change.

Finally, the Government suggests that Respondent's statement that the exercise of peremptory challenges would permit the addition of more minorities on the panel somehow eviscerated the right to have a peremptory challenge because it would have violated the equal-protection clause. That position is without merit. Clearly, under the Sixth Amendment, defense counsel may make note of the jury's racial composition so as to emphasize that it does not reflect a fair-cross section of the community. U.S. const. amend. VI. Moreover, defense counsel had previously lodged two objections under Batson, *supra* based on race and one had been denied. J.A. 175-177. The defense comments were entirely appropriate.

More importantly, defense counsel merely recited one effect that additional peremptory challenges would have on the panel. J.A. 185-186 (advising the district court of "the *other* advantage" of permitting an additional peremptory challenge (emphasis added)). He did *not* state that he wished to exercise a peremptory challenge in order to remove jurors because of their race. Of course, had the district court allowed the parties an additional peremptory challenge, the Government could have made its own Batson challenge under McCollum, *supra*, which

---

[11] Frank, of course, was long ago overruled by the Ninth Circuit, which has repeatedly held that there need not be a showing of prejudice. See, e.g., United States v. Turner, 558 F.2d 535, 538 (9th Cir. 1977); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir.), cert. denied, 459 U.S. 1026 (1983).

would have given defense counsel an opportunity to demonstrate the propriety of his strikes.

The Government's claim illustrates the very problem with applying harmless error in this context. The courts cannot and should not have to engage in that kind of wild speculation. It is enough to know that there is a possibility, here almost a certainty, that the jury composition would have been different absent the district court's error.

IV. CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

MICHAEL D. GORDON
Counsel of Record
RONALD RYCHLAK
Of Counsel
University of Mississippi
School of Law
University, MS 38655

OCTOBER 1999

(8)

No. 98-1255

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

32 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute and rules: Page

In the Supreme Court of the United States

No. 98-1255

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent makes three main arguments: that his use of a peremptory challenge to remove a juror who should have been excused for cause violated his rights under Rule 24 of the Federal Rules of Criminal Procedure; that the purported violation of the Rule establishes a violation of his rights under the Due Process Clause of the Fifth Amendment; and that, despite respondent's unfettered exercise of at least nine out of ten allotted peremptory challenges to select the petit jury and the ultimate empanelment of an "impartial jury" within the meaning of the Sixth Amendment, the erroneous impairment of one peremptory challenge "defies harmless-error review" and constitutes "struc-

tural error" that mandates reversal of his conviction. Resp. Br. 28. None of those contentions has merit.

A. The Use Of A Peremptory Challenge To Remove A Juror Who Should Have Been Removed For Cause Is A Proper Function Of The Challenge, Not An "Impairment" Of It

1. Respondent's use of one of his peremptory challenges to cure the district court's erroneous denial of his challenge for cause did not impair his rights under Federal Rule of Criminal Procedure 24. Respondent concedes, as he must, that a principal purpose of peremptory challenges is to help secure the constitutional guarantee of an objectively fair and impartial jury.[1] Respondent accepts that peremptory challenges are "a tool for the Sixth Amendment's guarantee of an objectively fair and impartial jury" (Br. 12) and "a vehicle that drives toward Sixth-Amendment compliance" (Br. 15). When respondent used one of the ten defense peremptory challenges to remove juror Gilbert, his action served that purpose and, therefore, constituted a use contemplated by Rule 24.

Respondent contends (Br. 13), however, that the right to exercise peremptory challenges is also designed to allow a defendant to exclude potential jurors who, despite being objectively impartial, are subjectively unacceptable to the defense. See *Swain* v. *Alabama*, 380 U.S. 202, 214-220 (1965); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892). Respondent then characterizes the defendant's interest in a jury that he "subjectively" perceives to be "fair" (Br. 12) as an overriding value that may not be infringed by the trial court. That is not correct. Peremptory challenges are extended by legislatures as a matter of policy, not as a matter of constitutional right, and they are necessarily subject to a variety of procedural restrictions. Under no circumstances is the defendant assured of the right to exclude all jurors "whom the defendant feels harbor prejudice against him but cannot successfully challenge for cause." *Ibid.* Peremptory challenges are limited in number and variable at the legislature's will. Accordingly, the jury ultimately selected may include a number of jurors, or even an entire panel, whom the defendant subjectively distrusts.[2] And even considering only the allotted number of strikes, this Court has upheld a variety of procedures that restrict the defendant's "right" to use peremptory challenges to advance his "subjective" interests. See *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) (sharing of peremptories among co-defendants); *Pointer* v. *United States*, 151 U.S. 396, 409, 412 (1894) (simultaneous defense and prosecution strikes); *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894) (requirement to exercise or waive peremptory strike as each potential juror is selected at random and qualified); U.S. Br. 16-

---

[1] See *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.8 (1994) (purpose "is to permit litigants to assist the government in the selection of an impartial trier of fact") (quoting from *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)); *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) (peremptory challenges are a "means to the constitutional end of an impartial jury and a fair trial"); *Frazier* v. *United States*, 335 U.S. 497, 505 (1948) ("the right is given in aid of the party's interest to secure a fair and impartial jury").

[2] In addition, the Constitution prevents the defendant from removing jurors based on race, ethnicity, or gender, *Georgia* v. *McCollum*, 505 U.S. 42 (1992); see *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Hernandez* v. *New York*, 500 U.S. 352 (1991), even though that restriction may result in the defendant's subjective discomfort with the jury.

18. Those cases refute respondent's contention that peremptory challenges provide absolute protection of the defendant's interest in a "subjectively fair" jury.[3]

Against that background, a defendant may properly be required to use a peremptory challenge to cure an erroneous ruling on a challenge for cause. See *Ross* v. *Oklahoma*, 487 U.S. 81, 89 (1988) (noting similar rule under state law). As a practical matter, requiring the defendant to use a peremptory challenge to cure an erroneous denial of a for-cause challenge imposes a far less onerous burden on the right than the consequences of a court's choice among various approved jury-selection procedures. And the alternative—permitting the defendant to withhold a peremptory challenge notwithstanding his disagreement with the trial court's ruling on a challenge for cause—would be to increase the risk of reversal whenever the trial court rejects a challenge for cause. Under respondent's position, a defendant who does not exercise a peremptory challenge to remove the suspect juror may apparently appeal based on the trial court's erroneous denial of the for-cause challenge, while a defendant who does remove the juror with a peremptory challenge may appeal based on the

[3] These decisions also make plain that judicially imposed procedures restricting the unfettered opportunity to exercise peremptory challenges have long been upheld. Respondent therefore errs in arguing (Br. 20-21) that a holding that defendant must use a peremptory challenge to cure a trial court's denial of a for-cause challenge must be enacted by Congress rather than imposed through decisions of the courts. "It is not necessary to multiply illustrations of the familiar principle [that peremptory challenge procedures may be 'regulated by the common law'] which while safeguarding the essence of the constitutional requirements, permits readjustments of procedure consistent with their spirit and purpose." *United States* v. *Wood*, 299 U.S. 123, 145 (1936).

"impairment" of his right of challenge under Rule 24. Allowing the defendant both of those options undermines one of the core utilities of peremptory challenges, *i.e.*, to provide additional protection against the possibility that a court's error in seating a biased juror will invalidate the results of an otherwise fair trial.[4]

That conclusion is particularly true given the uncertainty that often surrounds a trial judge's determination of a challenge for cause. A juror who has expressed some preliminary leaning towards the prosecution or distaste for the defendant frequently will, after admonishment by the trial judge, state on the record that he will consider the evidence free from any bias. If the trial judge believes the juror's representation, the judge's denial of a challenge for cause will be virtually unassailable on appeal. See *Wainright* v. *Witt*, 469 U.S. 412, 424-426 (1985); *Irvin* v. *Dowd*, 366 U.S. 717, 723-725 (1961). But jurors do not always speak with precision, and there may be room for disagreement over whether an expressed commitment to follow the law is given too grudgingly or over the

[4] The ability of peremptory challenges to provide that cushion in the jury selection process also may be a partial explanation for the fact that Rule 24 increases the number of peremptory challenges from three to ten to twenty as the seriousness of the offense escalates from misdemeanor to felony to capital felony. Respondent argues (Br. 15) that "the logical reason for the graduated number of peremptory challenges is the increased need for the subjective perception of fairness as criminal exposure rises." That is not necessarily so. It is equally logical to conclude that subtle influences of bias or prejudice will more likely affect jurors when the charge involves a more serious offense against the community. The uncertainty surrounding determinations of for-cause challenges becomes more significant and thus there is a greater need to have more challenges available for defendants to use in helping achieve an objectively fair and impartial jury.

juror's private reservations.[5] Thus, notwithstanding a juror's representation, a defendant nonetheless may fear that the juror's true lack of impartiality lies undetected in the juror's subconscious. When a defendant uses a peremptory challenge to remove such a juror, it is impossible to say for certain whether that strike was used to remove a juror who was actually biased or merely one whom the defendant feared was disinclined toward him. In either case, the peremptory strike would have been well and properly employed.[6]

Respondent suggests (Br. 21-22) that our position would saddle defendants with the entire burden of ensuring the correctness of the district court's for-cause rulings. That is not the case. When the government

---

[5] In this case, for example, juror Gilbert's comments that he understood the presumption of innocence "in theory" (J.A. 133) may reflect little more than a particularly candid expression of what many jurors feel when they are asked to discard prior beliefs and impressions before entering the jury room. See *United States* v. *Dozier*, 672 F.2d 531, 548-549 (5th Cir. 1982) (upholding denial of a for-cause challenge notwithstanding juror's "unusually candid skepticism toward human capacity for emptying the subconscious at a moment's notice," given juror's agreement to decide the case based on the evidence and instructions; "[w]e can ask no more of those who must assume, for the duration of a trial, the almost superhuman posture of complete impartiality").

[6] If the feared bias of the "objectively" qualified juror exhibited itself during jury deliberations, the defendant would have no remedy. Federal Rule of Evidence 606(b) precludes inquiry after trial into the "effect of anything upon [a] juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith," with the exception of improper outside influences on jury deliberations. See *Tanner* v. *United States*, 483 U.S. 107, 120-121 (1987). A defendant's use of a peremptory challenge to excuse such a juror is an eminently proper function of that rule-based right.

challenges a juror for cause and the challenge is erroneously denied, the burden falls on the government to secure the Sixth Amendment requirement of an objectively impartial jury by exercising one of its peremptory challenges. There is no other remedy available to the government because the government cannot appeal an acquittal returned by a jury biased in favor of the defendant. An equal application of the law would similarly dictate that, when a defendant challenges a juror for cause and the challenge is erroneously denied, the burden falls on the defendant to secure the Sixth Amendment requirement by exercising one of his peremptory challenges. Because both the prosecution and the defense have a duty to seek an impartial jury, they both have a vested interest in exercising a peremptory challenge to remove a juror who was the subject of an erroneous for-cause challenge ruling.[7]

2. Respondent argues (Br. 16-18) that the rule of lenity requires Rule 24 to be interpreted in his favor. That canon of construction, however, has no application

---

[7] Respondent also suggests that our "proposed rule invites the prosecutor to routinely oppose a defendant's for-cause challenges, knowing that the defendant will bear the burden of the trial court error." Br. 21; see also *id.* at 22 (envisioning a "continuous flow of objections to legitimate for-cause challenges"). Such a prediction of prosecutorial "gamesmanship" (*ibid.*) runs counter to this Court's consistent view that, absent clear evidence to the contrary, courts presume that federal prosecutors will "properly discharge[] their official duties," *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995) ("tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty"). Respondent's speculation also underestimates federal trial judges, who would doubtless take notice if a prosecutor were offering repeated unfounded arguments during jury selection and who have ample means to deal with such abuses.

in this context. Respondent acknowledges (Br. 16) that the rule of lenity is not applicable unless the case raises a "grievous ambiguity or uncertainty in the language and structure of" the provision under interpretation. *Ibid.* (quoting from *Chapman* v. *United States*, 500 U.S. 453, 463 (1991)). That standard is not met here. The rule we propose is not addressed in the text of Rule 24, but derives from the Court's long-recognized authority to develop sensible procedures to administer the right of peremptory challenge.[8]

[8] Respondent does not take issue with our discussion of state cases that reach generally similar results to the rule we propose here. See U.S. Br. 20-21 n.5 & App. 4a-6a. The prevalence of such approaches in the States, despite the absence of express statutory provisions to that effect, supports the view that courts can formulate procedures that reinforce the role of peremptory challenges as a backstop for the trial judge's rulings on for-cause challenges. Amici National Association of Criminal Defense Lawyers, et al., take issue with our categorization of a few of the state cases and with our reliance on post-*Ross* state cases, which, they argue, responded to *Ross* by judicially changing the rules. See Amici Br. 13 n.11. Amici apparently have no quarrel with our characterization of the vast majority of the 26 States that decline to treat an erroneous denial of a for-cause challenge as reversible error when the contested juror was removed by defendant's use of a peremptory challenge. The important point to draw from the state cases that amici chooses to dispute is that they do not support respondent's position of automatic reversal if a peremptory challenge is used to cure an erroneous for-cause ruling. See *Sams* v. *United States*, 721 A.2d 945, 951 (D.C. 1998) (noting that "denial or impairment of the peremptory challenge right is a 'trial error' within the meaning of [*Arizona* v.] *Fulminante* [499 U.S. 279 (1991)]," and not a "'structural error'" and thus is "subject to harmless error review when it has been properly preserved"), petition for cert. pending, No. 98-8712; *State* v. *Pelletier*, 552 A.2d 805, 809 (Conn. 1989) (rejecting defendant's contention of error in use of peremptory challenges to cure erroneous for-cause rulings because defendant received more than allotted number of peremptories, the challenge on the for-cause rulings was without merit, and the defendant never identified any biased jurors who actually served); *State* v. *Broom*, 533 N.E.2d 682, 695 (Ohio 1988) (to make out a constitutional violation, "the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial"), cert. denied, 490 U.S. 1075 (1989); *Adanandus* v. *Texas*, 866 S.W.2d 210, 220 (Tex. Ct. Crim. App. 1993) (to present reversible error in for-cause challenge, defendant must show exhaustion of all peremptories, the trial court denied request for more, and a biased juror sat), cert. denied, 510 U.S. 1215 (1994).

Finally, amici are simply incorrect that only *Ross* adopted a "cure-or-waive" rule. See, *e.g.*, *State* v. *Baker*, 935 P.2d 503, 510 (Utah 1997); *State* v. *DiFrisco*, 645 A.2d 734, 753 (N.J. 1994) (noting that "the rule recognized by several federal circuits and at least twenty-two other states" is that, "for the forced expenditure of a peremptory challenge to constitute reversible error * * *, a defendant must demonstrate that a juror who was partial sat as a result of the defendant's exhaustion of peremptory challenges") (citing cases), cert. denied, 516 U.S. 1129 (1996).

In any event, the purposes underlying the rule of lenity make clear that it does not apply to the construction of rules of criminal procedure. As this Court explained in *United States* v. *Lanier*, 520 U.S. 259 (1997), the rule of lenity is a manifestation of the "fair warning requirement," which provides that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see *Lanier*, 520 U.S. at 265. The rule of lenity also "reflects the deference due to the legislature, which possesses the power to define crimes and their punishment." *Id.* at 265 n.5. Viewed in light of those two purposes—ensuring fair warning and deferring to legislative definitions of crimes and punishment—the lenity principle applies only to criminal statutes, and not to

rules of procedure. As *Lanier* emphasized, "the canon of strict construction of *criminal statutes*, or rule of lenity, ensures fair warning by so resolving ambiguity in a *criminal statute* as to apply it only to conduct clearly covered." *Id.* at 266 (emphasis added); see *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).[9]

B. A Violation Of Rule 24 Would Not Constitute An Infringement Of Respondent's Due Process Rights

Even assuming that the trial court's error in ruling on the for-cause challenge to juror Gilbert compelled respondent to use a peremptory challenge he would otherwise not have used, and thereby impaired his peremptory-challenge rights under Rule 24, any such violation would not infringe respondent's rights under the Due Process Clause. Resp. Br. 23-26. A violation of

[9] Respondent is incorrect (Br. 16-17) that *Smith* v. *United States*, 360 U.S. 1 (1959), requires the rule of lenity to be applied to rules of procedure. In *Smith*, the Court considered whether the federal kidnapping statute, 18 U.S.C. 1201, established one offense with varying possible punishments, or two separate offenses with different maximum punishments. See 360 U.S. at 6-9. The Court's answer to that question determined when a defendant needed to be charged by formal indictment, and when (or if) he could be charged by information. The Court construed the statute as defining one offense with a range of possible punishments. *Ibid.* One of those possible punishments was the death penalty. Thus, because under the Fifth Amendment and Federal Rule of Criminal Procedure 7(a) no one may be prosecuted for a capital offense except by indictment, the Court held that all prosecutions under the statute needed to proceed by indictment. *Ibid.* That the Court's holding had consequences for the application of Rule 7(a) does not mean that the Court intended the rule of lenity to apply to all procedural rights. It did not, and none of this Court's cases since *Smith* have suggested that the lenity principle should be applied to the construction of the Federal Rules of Criminal Procedure.

a procedural rule results in a denial of due process only when it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986), or "so infuse[s] the trial with unfairness as to deny due process of law," *Estelle* v. *McGuire*, 502 U.S. 62, 75 (1991) (quoting *Lisenba* v. *California*, 314 U.S. 219, 228 (1941)). The most that respondent can show is that the district court's erroneous for-cause ruling caused him to exercise his peremptory challenges against nine, rather than ten, unquestionably impartial jurors. He cannot demonstrate that the unfettered use of only nine challenges infused the trial with fundamental unfairness.

Respondent argues (Br. 24, 32-35) that this Court is foreclosed from addressing that issue because, in the court of appeals, the government conceded that a violation of Rule 24 would offend due process. The court of appeals, however, did not accept that concession, but decided the due process issue on the merits. See Pet. App. 9a. The government challenged that holding in a petition for rehearing, and then properly raised it in the petition for a writ of certiorari filed in this Court. The issue has been briefed here, and there is no barrier to its consideration on the merits. Cf. *United States* v. *Wells*, 519 U.S. 482, 487-488 (1997); *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992).

In contending that there was a due process violation in this case, respondent relies principally (Br. 25) on *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), but that case is far different from this one. Unlike in this case, where respondent concedes that the jury that convicted him was completely impartial notwithstanding the alleged procedural violation, in *Logan* the violation of the plaintiff's procedural rights had the effect of completely extinguishing his constitutionally pro-

tected property interests. See *id.* at 427-428, 431. Contrary to respondent's submission, *Logan* should not be read to transform a mistaken district court ruling under a code of criminal procedure into a constitutional due process violation. As we note in our opening brief (at 24-25), such a ruling would have a significant impact on the criminal justice system and on the federal courts' habeas corpus docket.

C. Any Error In This Case Was Harmless

Assuming that the district court's action during jury selection impaired respondent's peremptory challenge rights, giving rise to a violation either of Rule 24 or of the Due Process Clause, any such impairment of respondent's right to exercise peremptory challenges is subject to the harmless-error standard and, in this case, is harmless.[10] Respondent does not dispute that he was tried by an impartial jury, notwithstanding the trial court's error. Nor does he explain why his ability to make free use of nine (out of ten) peremptory challenges should not be regarded as a "substantial" enjoyment of his peremptory challenges rights. Instead, he contends that *any* impairment of peremptory challenge rights constitutes "structural" error that is reversible per se; that even if a showing of case-specific prejudice is appropriate, it is met here because the error affected the composition of the jury; and, finally, that his failure to object to any of the seated jurors and request an

[10] Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." To affect "substantial rights," a violation ordinarily "must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). See U.S. Br. 27-28.

additional challenge is irrelevant to his ability to obtain reversal. Each of those claims is incorrect.

1. *Structural error.* Errors in procedure, even those that violate important constitutional rights, are subject to case-specific harmless-error analysis unless the right affected is one of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *United States* v. *Olano*, 507 U.S. 725, 735 (1993); see *Chapman* v. *California*, 386 U.S. 18 (1967). Respondent asserts that the error in this case is "structural" because "the harm cannot be measured in any meaningful way" (Br. 9) and because of "the essential nature of peremptory challenges in jury selection" (*id.* at 28). The impairment of peremptory challenges, however, cannot be viewed as "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to [its] effect on the outcome." *Neder* v. *United States*, 119 S. Ct. 1827, 1833 (1999).

The impairment of a defendant's peremptory challenges can result in case-specific reversible harm where the defendant cannot prevent a biased juror from being seated on the jury because the defendant has exhausted his peremptory challenges. See U.S. Br. 22 n.6, 37 n.14. But where that form of harm does not materialize, the impairment of peremptory challenges does not alter the basic framework of the trial. The defendant continues to enjoy counsel, an unbiased jury, and the other protections afforded by the Constitution and rules of procedure. While the defendant may have a subjective

discomfort with a particular juror,[11] the infringement of that value does not rise the level of the structural errors found by this Court, such as the total denial of counsel or the giving of a defective reasonable doubt instruction. See *Neder*, 119 S. Ct. at 1833 (listing the "very limited class of cases" finding "structural error"). It certainly does not justify a rule of per se reversal when the degree of harm is balanced against the "substantial social costs" of a reversal following a trial in which there was a "fair determination of the issue of guilt or innocence." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986); see *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 555-556 (1984) ("A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process").[12]

---

[11] That is not necessarily the case here, however, where respondent did not object to the seating of any of the jurors after the completion of the initial jury selection. J.A. 182; see pp. 16-18, *infra*.

[12] Respondent's reliance (Br. 9, 30) on this Court's reversal of convictions following a race-based peremptory challenge, without conducting harmless-error analysis, is misplaced. This Court has explained that "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991) (internal quotation marks and citation omitted). "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.* at 412; see also *Mechanik*, 475 U.S. at 70-71 n.1 (noting uniquely "pernicious" effects of racial discrimination on a grand jury). Nothing of the kind can be said of a trial judge's error in assessing the impartiality of one juror, followed by the removal of the juror through a peremptory challenge.

2. *Change in the composition of the jury.* Respondent further contends (Br. 34-37) that, if some form of harmless-error analysis is required, "the only possible measure in assessing harm or prejudice is to analyze whether the jury composition could have changed as a result of the error." *Id.* at 10 (citing *Gray* v. *Mississippi*, 481 U.S. 648, 665 (1987)). He asserts (*id.*, at 36) that "[i]n the context of the peremptory challenges, there can be no other way." *Ibid.* *Gray* does not support respondent's contention.[13]

In *Gray*, the trial court erroneously excluded for cause a juror who was qualified to serve in a capital case despite a general philosophical opposition to the death penalty. 481 U.S. at 653-655. The Court held that such an erroneous exclusion for cause violated the defendant's Sixth Amendment right to a jury composed of a fair cross-section of the community. *Id.* at 657-659. It reversed the conviction, viewing the exclusion of the juror there as a constitutional error that "goes to the very integrity of the legal system" to which "harmless-error analysis cannot apply." *Id.* at 668. In *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), however, this Court expressly "decline[d] to extend the rule of *Gray* beyond

---

[13] Nor is there merit to respondent's thesis that there is no other way to gauge prejudice. As we explained in our opening brief (at 31), the Court concluded in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), that the proper question, when voir dire failed to elicit necessary information during jury selection, is whether the error "affect[ed] the essential fairness of the trial," *id.* at 553, and that such a showing could be made if proper answers on voir dire would have enabled a challenge for cause, but not if proper answers would only have influenced the exercise of peremptory challenges. *Id.* at 555-556. Other than to note in a parenthetical that *Greenwood* was a civil case (see Resp. Br. 23 n.6), respondent provides no explanation of why the approach of *Greenwood* could not apply here.

its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved." 487 U.S. at 87-88.[14] In view of the high costs to society and to victims of crimes when appellate courts reverse convictions (see U.S. Br. 35-37), this Court should not adopt a rule requiring the reversal of convictions simply because of the possibility that some other legally qualified juror might have sat on the case.

3. *Failure to request an additional challenge.* Finally, respondent argues that it is not a sufficient showing of harmlessness that the record reveals that he made no objection to the jury that sat, or any request for an additional peremptory challenge to exercise against another prospective juror.[15] Contrary to respondent's claim, such a request would not have asked "for something just expressly denied," Resp. Br. 38; rather, such a request would have been a concrete manifestation that respondent believed himself aggrieved by the erroneous ruling on juror Gilbert.

[14] The *Ross* Court cited with approval the observation in Justice Scalia's dissent in *Gray* (481 U.S. at 678) that "the statement that any error which affects the composition of the jury must result in reversal defies literal application." *Ross*, 487 U.S. at 87 n.2.

[15] At the close of the initial jury selection, the trial court read the names of the jurors and the selected alternate and asked:

> THE COURT: All right. Any objection now to any of those jurors?
>
> MR. GARCIA [respondent's counsel]: None from us.
>
> THE COURT: Any further objection to our procedures?
>
> MR. KIRBY [the prosecutor]: No, Your Honor.
>
> THE COURT: All right.

J.A. 182. If he had objected to any of the selected jurors, respondent could have asked the court for an additional peremptory challenge under Fed. R. Crim. P. 24(b) ("If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.").

As we argued in our opening brief (at 37-38), at least where a defendant has the untrammeled exercise of nine of ten peremptory challenges, there can be no finding that an impairment of a single challenge, which was used to remove a biased potential juror, establishes an error that "affect[ed] substantial rights." Fed. R. Crim. P. 52(a). To the contrary, a defendant in that position has had the substantial right to participate in the selection of the jury through peremptory challenges, notwithstanding the trial court's error in denying the challenge for cause. But even if the impairment of one peremptory challenge could be shown to "affect substantial rights," there should be some indication in the record that the defendant was dissatisfied with the jury ultimately chosen. Absent that, "we are left with no idea whether [respondent] 'wasted' a peremptory, let alone wanted to strike another venireman who was not to his liking (for a legitimate reason) but couldn't do so because he was out of challenges." Pet. App. 16a (Rymer, J., dissenting). Any error, therefore, was harmless.[16]

[16] Respondent asserts (Br. 39) that he "expressly asked for an additional peremptory challenge after the petit jury was called," thus indicating his "dissatisfaction with the panel and a desire for compositional change." Respondent's statement, however, was made only after juror Finck (an originally selected juror) failed to appear, and respondent asked the court to select a new trial juror from the next three jurors on the list, while leaving the alternate

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999

---

in place. J.A. 185-186; see also J.A. 199. The court rejected that suggestion, and instead replaced Finck with the alternate juror. J.A. 186. Respondent explained that the advantage of his proposal would have been that it "gets us now into the area where we finally in this jury panel have a Hispanic." *Ibid.* But he did not ask for a peremptory challenge to strike the alternate whom the court made into a regular juror. Because "the right * * * of challenge does not necessarily draw after it the right of selection, but merely of exclusion," *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482 (1827), respondent's request was insufficient to show an objection to the panel as selected.

No. 98-1255

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ABEL MARTINEZ-SALAZAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE FEDERAL DEFENDER ASSOCIATION *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BARBARA BERGMAN
Albuquerque, New Mexico

Of Counsel

DAVID A. REISER
Counsel of Record
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
633 INDIANA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 628-1200

Counsel for National Association of Criminal Defense Lawyers, Public Defender Service for the District of Columbia, and Federal Defender Association as Amici Curiae

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE FEDERAL DEFENDER ASSOCIATION *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The National Association of Criminal Defense Lawyers, the Public Defender Service for the District of Columbia, and the Federal Defender Association submit this brief as *amici curiae* in support of the respondent.[1]

INTERESTS OF AMICI CURIAE

Amici are organizations that are committed to the legal representation of the accused in criminal cases.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

---

[1] The parties have consented to submission of this brief. In conformity with Rule 37.6, *amici* inform the Court that no party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Public Defender Service for the District of Columbia (PDS) was established by Congress to provide representation to indigent persons charged with crimes in the courts of the District of Columbia. PDS has filed *amicus curiae* briefs in a number of significant cases before the Court, including *Gray v. Maryland,* 118 S. Ct. 1151 (1998), *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Lewis v. United States*, 518 U.S. 322 (1996); *United States v. Salerno*, 481 U.S. 739 (1987); and *Schall v. Martin*, 467 U.S. 253 (1984). PDS has a particular interest in this case because it represents Jibreel Reid, one of the appellants in *Sams v. United States*, 721 A.2d 945 (D.C. 1998), a case in which the District of Columbia Court of Appeals held that the infringement of a defendant's right of peremptory challenges was harmless.

The Federal Defender Association (FDA) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the FDA's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT OF THE CASE

Jury selection in Martinez-Salazar's trial on drug distribution and firearms charges[2] commenced before District Judge Earl H. Carroll on December 7, 1993. The court empanelled 45 prospective jurors (J.A. 191-92),[3] and allotted ten peremptory challenges to Martinez-Salazar and

[2] See Indictment, J.A. 47-49,

[3] The trial judge thought 44 jurors had been called. (J.A. 64). The jury list shows a total of 45.

his co-defendant, Celso Organista-Dorantes[4] and six peremptory challenges to the prosecution (J.A. 167).[5]

As part of the jury selection process, the district court distributed a questionnaire to the prospective jurors. Venire member Don Gilbert responded to question number 8 on the questionnaire, "I would favor the prosecution."[6] In response to the court's question during individual voir dire whether he "would simply vote for a conviction because people are charged with drug crimes," Gilbert replied: "No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution." Gilbert "wouldn't disagree" with the court's statement that "all things being equal wouldn't be [proof] beyond a reasonable doubt." The court then posed an "important question . . . if you were the defendants here charged with this crime and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?" Gilbert responded candidly: "I think that's a difficult question. I don't think I know the answer to that." (J.A. 131-33).

Defense counsel for Martinez-Salazar then inquired whether Gilbert would feel more comfortable erring in favor of the prosecution or the defendant. Gilbert answered:

> Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as indicated on here, I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong.

[4] Organista-Dorantes was acquitted of all charges.

[5] The court allowed one additional strike to each side for the alternate juror (J.A. 167-68).

[6] The jury questionnaire is not included in the record.

(J.A. 133). The judge then reminded Gilbert that he had already instructed the prospective jurors on the presumption of innocence (*see* J.A. 93), and that the way our legal system operates "[t]he presumption is the other way." (J.A. 133). Gilbert responded, "I understand that in theory." The judge then abruptly terminated the questioning and moved on to the next juror. (Id.). Gilbert never promised to follow the court's instructions on the presumption of innocence or the standard of proof, and never reconciled his "theoretical" understanding of the court's instruction on the presumption of innocence with his continued inclination to be favorable to the prosecution and his assumption "that people are on trial because they did something wrong."

Both defense lawyers challenged Gilbert for cause. (J.A. 162-63). The prosecutor argued that, "although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." (J.A. 163). The judge then began to rule:

> You know about him and you know his opinions. He did say that he could follow the instructions, and he said he – "I don't think I know what I would do," et cetera. So I think you have reasons to challenge him if you – strike him if you choose to do that, but again, I think he fits in Hanserd's [another juror challenged for cause by the prosecutor because she was "emotional" about a recent death in the family (J.A. 161-62)] parameters as well.

(J.A. 163). Martinez-Salazar's counsel added that he had challenged Gilbert for cause because "[w]hen he stated all things being equal, that to me indicated a disregard for Your Honor's instruction on the presumption of innocence." Judge Carroll denied the challenge, explaining "then he came back and said yes, again that he

would follow it and so forth. Again, he's – you know – about him and you can do what you wish with him, but --." (J.A. 163).

After voir dire, the court excused three members of the venire (J.A. 170-71). A fourth prospective juror (Bingham) was "marked off the list," but not excused from the courtroom. (J.A. 175). The parties then exercised their peremptory challenges in an off-the-record proceeding. When court reconvened, Organista-Dorantes's lawyer raised a challenge to the prosecutor's strikes of the only minority jurors on the panel eligible to serve. Martinez-Salazar joined in his motion. (J.A. 176). The court disallowed one of the prosecutor's strikes and reinstated the juror. (J.A. 178). The court then granted each side an additional strike for the alternate seat. (J.A. 179-80). This would have placed Don Gilbert in line to serve on the jury as the second prospective alternate, however Gilbert had already been removed by a defense peremptory challenge. (J.A. 180). The parties exercised their final strikes, selecting twelve jurors and an alternate. (J.A. 181). Because one of the selected jurors was absent, however, Martinez-Salazar's counsel suggested giving each side an additional peremptory challenge and to select a replacement juror from among the next three venire members. (J.A. 185). Instead, the trial judge decided to require the missing juror to be present on December 9, and, if the juror did not appear, to proceed without an alternate.

When the trial resumed on December 9, Martinez-Salazar's counsel challenged the juror who had been absent for cause because the juror had wandered into another courtroom and observed defense counsel representing a client in another unrelated drug case. He also moved for a mistrial, "because of the composition of the jury," (J.A. 196), explaining that if the court had granted his previous request to select a new juror, the jury might have included a Hispanic venire member. (J.A. 198). The court agreed to

excuse the juror (Finck), but decided to go forward with a jury of twelve and no alternate rather than resume jury selection as Martinez-Salazar's counsel proposed.[7]

The jury found Martinez-Salazar guilty of all counts on December 13, 1993 (J.A. 25, D.E. 68). Judge Carroll sentenced him to an aggregate term of 123 months imprisonment on March 9, 1994 (J.A. 50-52). Martinez-Salazar timely noted an appeal of his conviction.

On appeal, the government insisted that the district court's decision not to excuse Gilbert for cause was appropriate. Appellee's Supplemental Brief at 3-9, *United States v. Martinez-Salazar*,146 F.3d 653 (9th Cir.1998)(No. 94-10158). Alternatively, the government contended that Martinez-Salazar had failed to prove a due process violation consistent with Circuit precedent, because Martinez-Salazar could not prove that *he* rather than his co-defendant had exercised the peremptory strike used to remove Gilbert. Id. at 12. The Court of Appeals reversed Martinez-Salazar's conviction in an opinion issued on May 28, 1998. (Pet. App. 1a-19a) The court denied rehearing on October 7, 1998 (Pet. App. 20a).

SUMMARY OF THE ARGUMENT

Before this Court, the government does not challenge the Court of Appeals' conclusion that the district judge erred in denying Martinez-Salazar's challenge of prospective juror Don Gilbert for cause. The question, error now conceded, is whether the error the district court committed warrants reversal when the defense sacrificed a peremptory challenge to remove the juror, reducing its

[7] As a result, Gilbert would have served as a regular juror had the defense not struck him. The government certainly would not have used a peremptory strike against him after objecting to the challenge for cause, so Gilbert would have been chosen as an alternate. When the missing juror did not appear, the alternate was placed on the jury.

allotment of strikes. The government unfairly derides the decision below as an "automatic reversal" rule, but reversal is "automatic" only when the defendant has shown an infringement of his use of peremptory challenges. This standard is the settled practice in most of the Circuits[8] and is consistent with the letter and the spirit of Rule 52(a), which requires federal courts to disregard errors only when the prosecution can show there has been no effect on a "substantial right." The statutory right to exercise peremptory challenges is a substantial one, and its infringement warrants reversal on appeal.

The current majority rule in the regional Courts of Appeals remains that an infringement of the defendant's right to use his or her allotted peremptory challenges for any reason except a discriminatory one requires reversal without showing that an actually biased juror sat on the jury or that the infringement affected the verdict. *United States v. Serino*, 163 F. 3d 91, 93 (1st Cir. 1998); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir. 1998); *United States v. Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997); *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 162 (3d Cir. 1995); *United States v. Love*, 134 F.3d 595, (4th Cir.), *cert. denied*, 118 S.Ct. 2232 (1998); *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 2341 (1998); *United States v. Annignoni*, 96 F.3d 1132 (9th Cir. 1996)

[8] Two Circuits, the 8th and 10th, appear to have recently adopted a different rule. (Pet. Br. at 32 n.11). Both courts have done so in erroneous reliance on *Ross v. Oklahoma*, 487 U.S. 81 (1988), as deciding the very question presented in this case and which the *Ross* court expressly reserved, 487 U.S. at 91 n.4. In *United States v. Torres*, 960 F.2d 226, 228 (1st Cir. 1992), the defendant did not exhaust his peremptory challenges and therefore did not suffer any infringement.

(en banc). Reversals on the basis of a failure to excuse a juror for cause have been rare, because the deferential standard of appellate review gives considerable leeway to district court judges to appraise the fairness of a prospective juror, even if an appellate panel would reach a different conclusion. Current law thus gives the defendant the protection of challenges for cause, and the ability, but not the obligation, to use a peremptory challenge to remove a prospective juror when the defendant's assessment of the juror's impartiality differs from that of the trial judge. This use of peremptory challenges reinforces the fundamental constitutional right to an impartial jury without sacrificing appellate review of challenges for cause.

In its effort to change the established rule, the government principally contends that if a defendant uses a peremptory challenge to remove a juror the district court should have excused for cause, the district court's error is unreviewable. The government charts two routes to this result. First, the government urges the Court to adopt a new requirement that a defendant must use a peremptory strike when a challenge for cause is denied, which would place the same limitation on the statutory right to peremptory challenges under Fed. R. Crim. P. 24 as existed under state law in *Ross v. Oklahoma*, 487 U.S. 81 (1988). Second, failing the adoption and application of such a new rule in this case, the government argues that so long as the jury did not include anyone who should have been excused for cause, the impairment of the defendant's use of peremptory challenges is always harmless. Alternatively, the government offers as a fallback position that reversal is unwarranted unless the defendant can prove on the record that the "jury that ultimately decided respondent's case would have been composed differently even if his for-cause challenge had not been erroneously denied." (Pet. Br. 14).

The government's initial argument insulates fundamental constitutional error from review. Jury impartiality is the bedrock of all of our doctrines of deference to jury verdicts, including the harmless error rule itself. The trial court's refusal to excuse a juror who avowedly would favor the prosecution and assume the defendant's guilt undermines this foundation and with it public confidence in the criminal law. It is a "structural" error which "is intrinsically harmful and that warrants reversal without any inquiry into case-specific prejudice." (Pet. Br. 29). In hindsight, Martinez-Salazar would have been entitled to reversal if he had elected not to strike Gilbert and had appealed the district court's ruling. The result should be no different here, when Martinez-Salazar had to sacrifice a peremptory challenge to remove the juror in an effort to minimize (but not eliminate) the harm. Adoption of the state law rule discussed in *Ross* would mean that a trial judge could make as many errors in qualifying jurors as the defendant had challenges without any recourse. Deeming the use of a peremptory challenge against a biased juror per se harmless error would also eliminate or impair appellate review of challenges for cause, even if the use of a peremptory strike is not legally required, because defense counsel will have no choice but to strike the juror using a peremptory challenge as a practical matter.

The government's fallback position rightly focuses on the impact of the error on the composition of the jury rather than on the outcome of the trial, but it erroneously shifts the burden of proof to the defense. Once error has been shown, the government must prove the error did not affect substantial rights. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *United States v. Olano*, 507 U.S. 725, 741 (1993). Peremptory challenges are a historic part of our jury trial process, and remain a statutory right of the defendant under the Federal Rules of Criminal Procedure.

When a defendant does not use all of his or her available peremptory challenges, the trial court's error has no effect and the defendant loses nothing.[9] But when, as in this case, the defense exhausts the allotted peremptory challenges and even asks for more, the government cannot show that the error had no effect on the composition of the jury. The government misuses procedural default concepts to penalize Martinez-Salazar for failing to make a record of prejudice at trial. Procedural default applies to the failure to object to legal error, not the failure to point out its harm, because there is no procedural rule requiring the defendant to proffer evidence of a harm once he has duly objected to the judge's ruling.

ARGUMENT

I. FEDERAL LAW AT THE TIME OF RESPONDENT'S TRIAL DID NOT REQUIRE A DEFENDANT TO STRIKE A JUROR WHO SHOULD HAVE BEEN REMOVED FOR CAUSE; ADOPTION OF SUCH A RULE IS A LEGISLATIVE FUNCTION AND IS UNSOUND POLICY.

The government initially seeks shelter under *Ross v. Oklahoma*, 487 U.S. 81 (1988), which held that a defendant who used a peremptory challenge to strike a juror who should have been excused for cause, as he was required to do under state law, was not deprived of rights protected by

[9] *Compare United States v. Torres*, 960 F.2d 226, 228 (1st Cir. 1992) (Breyer, C.J.) (no reversible error as defendant did not exhaust challenges) *with United States v. Cambara*, 902 F.2d 144, 147-48 (1st Cir. 1990) (per se reversal required if defendant exhausts peremptory challenges).

the Fifth or Sixth Amendments.[10] *Ross* followed earlier decisions recognizing that the defendant's statutory right to

[10] There is some question whether the error in this case should be characterized as a violation of Martinez-Salazar's Sixth Amendment right to an impartial juror which is not harmless because it caused the loss of a peremptory challenge, or as an infringement of a statutory or due process right to peremptory challenges. Regardless of how the error is characterized, it affected Martinez-Salazar's substantial right to exercise his peremptory challenges and therefore cannot be disregarded under FED. R. CRIM. P. 52(a). Accordingly, this brief focuses on the harm, rather than on the nature of the error.

Nevertheless, *amicus* submits that the error here is better understood as a Sixth Amendment violation as well as a statutory or due process violation. The district court's error here was to deny Martinez-Salazar's challenge for cause, precipitating his use of a peremptory strike. In *Ross* this Court held that the "statement [in *Gray v. Mississippi* 481 U.S. 648, 665 (1987)] that 'the relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error,'" 487 U.S. at 87 (internal citations omitted) was "too sweeping," and limited *Gray* to its context. 487 U.S. at 87-88. The *Ross* Court went on to say that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." 487 U.S. at 88. We believe this statement is also "best understood in the context of the facts there involved." 487 U.S. at 87-88 (referring to *Gray* in original). In *Ross*, Oklahoma law required the defendant to use a peremptory to remove a biased juror so long as one was available. In other words, state law gave the defendant a remedy other than an appeal for a Sixth Amendment violation. Because peremptory challenges are not constitutionally required, Oklahoma was entitled to prescribe the conditions for their use; requiring the use of peremptories as a trial-level remedy for trial court error was not unconstitutional, and the defendant's action cured the Sixth Amendment violation.

Ross would go too far, though, if it were read to equate a Sixth Amendment violation with a demonstrably biased jury. Defects in the process of jury selection have been held to violate the Sixth Amendment without proof of actual bias. *Taylor v. Louisiana*, 419 U.S. 522 (1975). Nor is there any principled basis on which to limit *Gray* to *Witherspoon* challenges, as opposed to other erroneous exclusions for cause, even though no biased juror actually sits on the jury. *Cf.*

peremptory challenges is subject to "the limitations placed on the manner of its exercise." *Stilson v. United States*, 250 U.S. 583, 587 (1919) (applying federal statute treating all defendants collectively for purposes of statutory right to exercise peremptory challenges). The decision in *Ross* turned on the existence of an established rule of state law that conditioned the defendant's freedom to use peremptory challenges on the obligation to use them against a juror challenged but not removed for cause. The defendant in *Ross* actually received all that he was entitled to receive under state law. 487 U.S. at 91. Because no such rule exists in federal criminal cases, the government's argument depends upon the adoption of a new rule and its retroactive application to this case.

The right codified in Federal Rule of Criminal Procedure 24 allows the defendant in a criminal case to remove a specified number of prospective jurors for any reason, provided that the defendant does not discriminate on the basis of race or sex. *See* Pet. Br. at 16 ("[a]t common law, a party could exclude a potential juror who would otherwise qualify for service, without providing a reason, and the federal statutes allowing such peremptory challenges carried forward the underlying purpose of that practice."). A duty to use these challenges to cure trial court errors would place a significant substantive limitation on the right of peremptory challenge, rather than merely establishing a procedure for exercising challenges. *See, e.g., St. Clair v. United States*, 154 U.S. 134 (1894), or *Pointer v. United States*, 151 U.S. 396 (1894). Nor is such a duty an established statutory condition on the right established by Congress, as were the restrictions arising from the rights of co-defendants in *United States v. Marchant*, 25 U.S. 480 (1827), or *Stilson v. United States*.

Batson v. Kentucky, 476 U.S. 79 (1986) (error to peremptorily strike juror on basis of race without regard to whether actual jury was biased).

In arguing for the adoption of a new rule in this case (Pet. Br. 20), the government concedes that federal law does not now contain a requirement like that long recognized in Oklahoma. Congress is, of course, free to accept the government's suggestion and to impose such a limitation on the peremptory challenge right, but it has not done so in the decade since the Court decided *Ross*.[11] It is for the legislative branch through the rules amendment

---

[11] The government seeks support for a new rule requiring the use of peremptory challenges against jurors not excused for cause in the "common law heritage of the federal peremptory challenge right" as reflected in a tally of states purportedly following such a rule. *See* Pet. Br. 20-21 n.5 & Appendix B. The state cases cited do not support the proposition that the defendant should be obligated to use peremptory challenges to remove a juror who should have been excused for cause in order to preserve the error for appeal, and several of the cases do not even support the government's more general claim that the loss of peremptory challenges to remove jurors who should have been removed for cause is harmless. *Sams v. United States*, 721 A.2d 945 (D.C. 1998), did not involve the use of a peremptory challenge to remove a juror who should have been struck for cause; the D.C. Court of Appeals has never decided this issue. PDS is counsel for co-appellant Jibreel Reid, whose petition for rehearing en banc is still pending. *State v. Pelletier*, 552 A.2d 805, 810 (Conn. 1989), is not a holding because the court found no error in failing to excuse the juror for cause. *See also Adananus v. State*, 866 S.W.2d 210, 219 (Tex. Crim. App. 1993) (reversible error if defendant exhausts peremptory challenges, asks for more, and can identify a juror who he would have challenged); *State v. Broom*, 533 N.E.2d 682, 695 (Oh. 1988) (error harmless when defendant did not exhaust peremptory challenges); *People v. Samayoa*, 938 P.2d 2, 20 (Cal. 1997) (same). The government also cites a number of states that no longer apply a per se reversal rule, but does so because of this Court's decision in *Ross*, rather than any deep "common law heritage." *See United States v. DiFrisco*, 645 A. 2d 734, 752 (N.J. 1994) (adopting new rule based on *Ross*); *State v. Baker*, 935 P.2d 503, 506 (Utah 1997) (same); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993)(same); *Dawson v. State*, 581 A.2d 1078, 1093 (De. 1990) (explicitly relying on *Ross* for holding). None of the cases cited in the government's Appendix (other than *Ross*) apply "a requirement that the defendant must use a peremptory challenge to 'cure' the trial court's erroneous denial of a for-cause strike." (Pet. Br. 19).

process to impose such a limitation on a statutory right it has created, not for the judiciary in its adjudicative capacity. *Cf. Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980)(rulemaking is legislative, not judicial function); *Lonchar v. Thomas*, 517 U.S. 314, 328 (1996) (recognizing "the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process."); *Business Guides v. Chromatic Comm. Enterprises*, 498 U.S. 533, 549 (1991)("Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside the rulemaking process. 'Our task is to apply the text, not to improve on it.'")(citation omitted).[12] Absent such a rule, Martinez-Salazar was harmed when he had to use a peremptory challenge to strike Gilbert, and therefore could not use the strike against another member of the panel.

Adopting a requirement that the defense use its peremptory challenges to remove jurors who should have been excused for cause, but were not, would undermine jury impartiality because it would largely eliminate any appellate scrutiny of for cause challenges. The record in this case illustrates the need for such review. The government objected to, and the district court denied, a challenge to a juror who would avowedly favor the prosecution and assume the defendant's guilt. The

[12] Even if such a change could be accomplished through adjudication, as opposed to quasi-legislative rulemaking subject to the approval of Congress, it would be fundamentally unfair to apply such a change retroactively to Martinez-Salazar. *See United States v. Foster*, 783 F.2d 1082, 1086 (D.C. Cir. 1985) (en banc)(Scalia, J.) (holding that change in interpretation of Fed. R. Crim. P. 29 to treat the presentation of evidence by defendant as waiver of motion for judgment of acquittal based on prosecution case would be applied prospectively only).

government's proposal would leave other serious abuses involving a large number of prospective jurors unremedied as well. A judge who applied the wrong legal standard might deny challenges against several jurors based on a response to the same question. The rule the government proposes could strip the defense of peremptory challenges, tipping the jury selection process markedly in favor of the prosecution.[13] In a federal death penalty case, for example, a misapplication of the *Witherspoon* standard could significantly affect the impartiality of the jury venire. Furthermore, the unavailability of appellate review of juror disqualification rulings would diminish the opportunity to clarify standards for juror disqualification. The standard for appellate review is highly deferential, *Patton v. Yount*, 467 U.S. 1025 (1983), and for that very reason requires the periodic refinement of general principles of juror impartiality and their application to new situations by appellate courts to guide district court judges. *Cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996) ("Independent review is therefore necessary if appellate courts are to maintain control of and to clarify the legal principles."); *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (requiring de novo review of voluntariness determination in part to assure appellate court control over and articulation of standard).

[13] Even assuming that intentional abuses could be challenged as a due process violation, *see Ross*, 487 U.S. at 91 n.5 (reserving question), it is hard to see why it is desirable to adopt a rule that would invite such abuses and would impose the difficult fact-finding burden an inquiry into the judge's intent entailed in such a due process challenge.

II. INFRINGEMENT OF THE RIGHT TO PEREMPTORY CHALLENGES AFFECTS A "SUBSTANTIAL" RIGHT UNDER FED R. CRIM. P. 52(a).

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894).[14] Rule 52(a) requires federal courts to disregard errors that do "not affect substantial rights." In 1965 this Court wrote that "denial or impairment of the right [to peremptory challenges was] reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219 (1965).[15] The fact that this remained a truism when *Swain* was decided, nearly two decades after the adoption of Federal Rule 52(a), and nearly fifty years after the enactment of the general federal

[14] This is so even if it is a right conferred by Congress, rather than a constitutional right. This case therefore requires the Court consider the effect of a failure to disqualify a juror on a federal statutory right, an issue not presented in *Ross*, or *Spies v. Illinois*, 123 U.S. 131 (1887).

[15] Although the government criticizes *Swain* for relying on outdated cases decided before the adoption of harmless errors statutes, it does not point to any evidence that the adoption of a general harmless error statute was intended to, or did change the practice described in *Swain*. *See, e.g., Harzell v. United States*, 72 F.2d 569, 577 (8th Cir. 1934). The government relies on *United States v. Lane*, 474 U.S. 438, 444-45 (1986), to argue that the language in *Swain* should be discounted because the opinion in *Swain* cited pre-harmless error era decisions. (Pet. Br. 33-34). But whether or not *Swain* is a dispositive holding, the fact that the adoption of harmless error principles had not called the per se reversal rule into question makes it doubtful that the framers of Rule 52(a) would have considered a denial of a peremptory challenge a minor technical error that could be ignored on appeal. The analogy between misjoinder and the denial of a peremptory challenge fails because an error in joinder is a classic kind of technical error that may have no effect on the trial at all, while the denial of a peremptory challenge does affect the composition of the fact-finder.

harmless error statute, is compelling evidence that the framers of the rule considered peremptory challenges a "substantial right," rather than a mere technical error that could be disregarded on appeal.[16]

The government argues that the district court's error was harmless, even though it cost Martinez-Salazar a peremptory challenge, because no actually biased juror served on his jury. The practical consequences of this rule on the appellate review of challenges for cause are no different from the consequences of requiring the defendant to strike the prospective juror in order to preserve the challenge for cause for appeal. Defense counsel at Martinez-Salazar's trial could not rely on the prospect of reversal on appeal, no matter how strongly they may have disagreed with the district judge's ruling. After all, the government tenaciously defended the ruling before the Court of Appeals, although it has not done so before this Court. Had defense counsel not struck Gilbert, Martinez-Salazar risked having that choice held against him on appeal as "evidence" that Gilbert's obvious bias on a cold transcript must have come across differently to the participants in the courtroom.[17] Under the government's standard the defense would be "damned if they do and

[16] The dichotomy in Rule 52(a) between "substantial rights" and mere "technical errors" predated and differs somewhat from the distinction that has evolved more recently in this Court between "structural" constitutional errors and errors that warrant reversal only if they are not harmless beyond a reasonable doubt. *See Neder v. United States*, 119 S.Ct. 1827, 1833 (1999) (distinguishing structural from harmless errors). A right need not be a "structural" constitutional error to be a "substantial right." The deprivation of peremptory challenges is, however, a structural error like other errors that involve the composition of the decisionmaker. *See, e.g., Gomez v. United States*, 490 U.S. 858 (1989).

[17] *Patton v. Yount*, 467 U.S. 1025, 1040 (1983), explained the rationale for deferring to a trial judge's decision not to excuse juror who may appear biased on a cold record.

damned if they don't" strike the juror.[18] The more egregious the trial court's error in refusing to excuse a prospective juror for cause, the more likely a conscientious lawyer will be compelled to strike the juror him or herself. Encouraging lawyers not to strike obviously biased jurors to gamble on an appellate reversal also wastes judicial resources that would not be expended if, upon striking the biased juror, the case would have resulted in a mistrial or an acquittal rather than by a conviction followed by an appeal and retrial.

The government nevertheless equates an effect on a substantial right with an effect on the outcome of the proceeding. (Pet. Br. 27, 30). But this equation is not consistent with the words of the Rule, its prior construction in this Court, or the drafting history of the Rule. Harmlessness statutes and Federal Rule 52(a) arose in response to an era in which courts became "citadels of technicality."[19] But errors affecting the selection and composition of the grand and petit jury were treated as harmful without regard to the outcome of the case even after the adoption of harmless error statutes. *See, e.g.,*

---

[18] *See United States v. Beasley*, 48 F.3d 262, 265 (7th Cir. 1995) (noting that the defendant used peremptory challenges to remove two of three jurors he challenged for cause and therefore these ruling are not reviewable on appeal, but did not use one of his remaining eight strikes against the only one of the three who actually served on the jury).

[19] For examples of purely theoretical injuries, see *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990) (violation of statute requiring prompt detention hearing did not invalidate present custody, so violation was harmless); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (unsuccessful effort to interfere with attorney-client relationship harmless); *Hill v. United States*, 368 U.S. 424 (1962) (purely formal violation of Rule 32(a)); *United States v. Timmreck*, 441 U.S. 780 (1979) (violation of Rule 11 was purely formal because defendant' sentence was within maximum range discussed in plea proceeding); *Peguero v. United States*, 119 S.Ct. 961 (1999) (failure to notify defendant of appeal was harmless because defendant would not have acted differently if advised).

Crowley v. United States, 194 U.S. 461, 474 (1904) (former harmless error statute relating to indictments "can have no bearing on the present case, for the disqualification of a grand juror is prescribed by statute, and cannot be regarded as a mere defect or imperfection in form; it is a matter of substance which cannot be disregarded without prejudice to the accused."); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) (reversing for refusal to ask question concerning possible racial prejudice during voir dire over dissent by Justice McReynolds asserting that the error was harmless).

As Justice Frankfurter explained, the original federal harmless error statute:

> was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of the accused to insist on a privilege which Congress has given him.

Bruno v. United States 308 U.S. 287, 294 (1939). On this basis, the Court held in *Bruno* that the failure to give an instruction on the defendant's failure to testify, implicitly commanded by an Act of Congress, required reversal without regard to the strength of the evidence in the case. Rule 52(a) "contains the substance" of the statute applied in *Bruno*, Notes of the Advisory Committee, and should be construed consistently with this roughly contemporaneous articulation of the harmless error principle.

The plain meaning of Rule 52(a) contradicts the government position. There are two components to the Rule 52(a) analysis: (1) is there a "substantial" right involved; and (2) is *that right* affected. The careful drafting process that lead to Rule 52(a) also shows that the use of language focused on the substantiality of the right, rather than exclusively on the ultimate outcome, was not inadvertent. *See generally* 6 LESTER B. ORFIELD,

CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 52:2 AT 442-447 (1967).

The importance of the distinction between an effect on a substantial right and an effect on the outcome is further supported by the Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946). Although *Kotteakos* is most often cited for its general description of the harmless error principle, the Court's application of that principle to the case at hand is revealing:

> We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.
>
> With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.
>
> It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden if it had been presented in separate trials for each offense or in one more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals in this case.

> That conviction would, or might probably have resulted in a properly conducted trial is not the criterion of § 269. We think it highly probable that the error had a substantial or injurious effect or influence in determining the jury's verdict.

328 U.S. at 775-76. This passage concerns a difference in methodology, not a disagreement about the weight of the evidence. Even if conviction would have been likely if the trial had been properly conducted as the Court of Appeals thought, making the error in that sense "harmless," that was not enough. The inquiry described in *Kotteakos* is, instead, a more nuanced one that better respects the frontier between the jury's role in deciding guilt or innocence on the evidence presented and that of an appellate court considering harm. In essence, the *Kotteakos* standard looks to whether the error would incline or distort the jury's decision-making process in favor of conviction, even if a jury not exposed to the error would have reached the same result. It is a standard that considers the effect of errors on the rights available to the contending parties in our adversary system, rather than one that second guesses the outcome of a hypothetical error free proceeding. This contemporaneous articulation of the harmless error principle is of obvious importance in understanding a rule that was intended to carry forward the substance of the statutes construed in *Kotteakos*.

This Court has declined to require an effect on the outcome for all errors under Rule 52(a). *See United States v. Olano*, 507 U.S. 725, 734-35 (1993) ("in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceeding," but expressly reserving whether "the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'"); *id.* at 737 ("[a]ssuming arguendo that

certain errors 'affec[t] substantial rights independent of prejudice.'"). Justice Kennedy's concurring opinion stated:

> it is equally evident that this violation [of Rule 24(c)] implicated "substantial rights" within the meaning of Rule 52. I cannot agree with the Court's suggestion in Part III of its opinion that Rule 24(c) errors may be deemed to "affect substantial rights" only when they have a prejudicial impact on a particular defendant. *At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'undermin[e] the structural integrity of the criminal tribunal itself."*

501 U.S. at 743-44 (Kennedy, J., concurring) (emphasis added). [20]

The standard for reversal the government proposes in a case in which the district court commits structural constitutional error, and the defendant tries to ameliorate the error by striking the juror using a peremptory challenge, is designedly impossible to satisfy. According to its brief, the district court's error "does not affect the defendant's 'substantial right' unless it affects the outcome of the trial." (Pet. Br. 30). Given the strong policies against invading the jury room,[21] no defendant could ever show that the use of a peremptory challenge against one juror rather than another actually affected the outcome of the trial. This Court has recognized that a different

---

[20] *See also Neder v. United States*, 119 S.Ct. 1827, 1834 (1999) (noting that the defendant was tried by a "fairly selected jury" and implying that a different standard would apply if the error involved the fairness of jury selection).

[21] *Tanner v. United States*, 483 U.S. 107 (1987).

standard must be applied when "[e]fforts to prove or disprove actual prejudice from the record before us, and guesses whether the outcome of the trial might have been different . . . would be purely speculative." *Riggins v. Nevada*, 504 U.S. 127, 137 (1992); *Waller v. Georgia*, 467 U.S. 39, 4 n.9 (1984); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (plurality opinion). Like its proposal to require the use of a peremptory challenge to remove a biased juror who is not excused for cause, the harmlessness standard proposed by the government would effectively insulate the most serious errors in the qualification of the jury panel from review.

The test that should be used to determine whether an error "affects" a right depends upon the context in which the error occurs. For example, an error that deprives a criminal defendant of a statutory right to appeal his conviction requires reversal without a showing that the defendant would have won the appeal. *Rodriquez v. United States*, 395 U.S. 327 (1969). The effect required is an effect on the defendant's exercise of the statutory right to appeal his conviction, not on the outcome of the appeal. Similarly, in *Zafiro v. United States*, 506 U.S. 534 (1993), this Court used the infringement of a "specific trial right," rather than a direct effect on the outcome to measure prejudice from a joint trial with an adversary co-defendant under Fed. R. Crim. P. 14. *See also Peguero v. United States*, 119 S.Ct. 961, 965-66 (O'Connor, J., concurring) (discussing "meaning of prejudice in th[e] context" of a failure to advise the defendant of the right to appeal); *United States v. Mechanik*, 475 U.S. 66, 76-77 (1986)(O'Connor, J., concurring in the judgment).

Peremptory challenges allow either side to remove a juror it believes will not be fair, even if the judge presiding over the trial is not persuaded that the juror should be excused for cause. They serve at least three important functions in a criminal trial. *First*, they allow the parties

to use their greater knowledge of the issues, witnesses and evidence in the case to assess the likelihood that a juror's views will lean in favor of one side or the other. The standard of review for decisions to excuse a juror for cause is highly deferential. Greater scrutiny would be required if the parties did not have the means to remove prospective jurors within the gray areas at the limits of judicial discretion. *Second*, they promote confidence in the outcome because, as Blackstone put it, "how necessary it is, that the prisoner (when put to defend his life) should have a good opinion of his jury." 4 William Blackstone, Commentaries * 353. *Third*, peremptory challenges tend to produce more impartial and representative juries, by allowing the parties to correct for statistical "sampling error" by removing jurors whose viewpoints are not reflective of the community in general.[22] The modern controversy surrounding the discriminatory use of peremptory challenges does not diminish in any way their "substantiality" under the Federal Rules as a matter of law or their practical value to the defendant. A "denial or impairment" by definition "affects" the right to peremptory challenges, without regard to whether the impairment also can be shown to have changed the outcome of the trial.

---

[22] "Sampling error" is defined as "the chance difference of a statistic from the corresponding population constant of which it is an estimate." WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 2008 (1971). In practical terms, it means that proportion of randomly-selected jurors in a given jury venire having a given trait may vary from the proportion of persons having that trait in the population from which the venire is selected. Predilections and opinions that may have a significant influence in jury deliberations may therefore be significantly over or under-represented on a jury through the "luck of the draw." Peremptory challenges tend to offset the inevitable effect of sampling error, as the parties are more likely to strike prospective jurors with unusual viewpoints that may bear on the trial testimony than jurors whose views are typical of the community.

The impact of a ruling depriving the defendant of a peremptory challenge cannot be translated into terms of an effect on the outcome of a trial without invading the jury's province. This court has repeatedly distinguished sufficiency from harmlessness. The fact that a reasonable jury could be satisfied of guilt beyond a reasonable doubt, allowing all inferences in favor of the prosecution, does not mean that a jury would actually draw such inferences, or that it would credit the testimony. An actual or probable effect on the verdict as a result of the denial of a peremptory challenge (or even a challenge for cause) could never be shown without opening the actual jury's deliberations to examination or engaging in a judicial re-weighing of the evidence. Taking away a peremptory strike changes the adversary balance in jury selection, and, unless the defendant does not exhaust his challenges, affects a substantial right. Saying that the denial of peremptory challenges is reversible error only if a biased juror sits on the jury (itself grounds for reversal) is the same as saying that the denial of a peremptory challenge itself never matters. *See United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting) (either "the error is always harmless or it is never harmless. There is no practical middle ground."). Infringement of the defendant's use of peremptory challenges therefore must be "subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'undermin[e] the structural integrity of the criminal tribunal itself.'" *United States v. Olano*, at 743-44 (Kennedy, J., concurring).

III. THE GOVERNMENT CANNOT SHOW THE ERROR DID NOT AFFECT SUBSTANTIAL RIGHTS.

The government's fallback position is that Martinez-Salazar failed to make a sufficient record at trial to show that the district court's error affected the composition of his jury. This argument elides the important difference between review for harmless error and review for plain error under Rule 52. The short answer to this portion of the government's brief is that under Rule 52(a) it is the prosecution's burden to show that an error should be disregarded because it did not affect a substantial right, not the defendant's burden to prove prejudice. Although the government faults Martinez-Salazar because he did not proffer to the district court precisely how he would have used his remaining peremptory challenge if he had not been forced to use it to remove juror Gilbert (Pet. Br. 38), he committed no procedural default because he had no duty to make such a proffer. Moreover, the record as a whole shows that Martinez-Salazar would have used the challenge had it been available.

The burden is on the prosecution to show the absence of any effect on a substantial right. *O'Neal v. McAninch,* 313 U.S. 432, 437-38 (1995); *United States v. Olano,* 507 U.S. 725, 741 (1993); *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946).. *See* Pet. Br. 30 n.10 ("The government carries the burden to show harmlessness if a proper objection is made in the district court."). As the Court recently reiterated in *O'Neal v. McAninch*, "grave doubt" about whether an error had an effect is resolved in favor of the defendant under Rule 52.

For the same reason, Martinez-Salazar committed no procedural default by failing to make a proffer about

how he would have used the peremptory challenge he employed to remove juror Gilbert, because no procedural rule required him to do so. The government urges the adoption of a new requirement, but this Court has never penalized a defendant for failing to abide by a procedural requirement that did not exist at the time of trial. *Ford v. Georgia*, 498 U.S. 411 (1991) (rejecting claim of procedural default under state law based on rule articulated after the defendant's trial). Certainly Martinez-Salazar had no obligation to object to the district court's ruling denying his challenge for cause against Gilbert on the additional ground that he would have to use a peremptory challenge to remove him, as it is clear from the record that this is precisely what the district judge anticipated he would do. Nor would proffering how he would otherwise have used the challenge have helped to persuade the district judge to change his ruling on the challenge for cause. Martinez-Salazar fully preserved his objection to the district court's action when he asked the judge to excuse Gilbert, and the district judge refused. He was not required to do more simply to rebut an anticipated prosecution claim that the error had no effect on his substantial rights.

The record shows, in any event, that the trial court's error did affect the composition of Martinez-Salazar's jury. Absent the peremptory challenge, Gilbert would have been seated on the jury, which the government acknowledges would have been grounds for reversal on appeal. Thus, the government can hardly complain that reversal on this record would hand Martinez-Salazar a windfall. The record shows that he exhausted his challenges, and that he asked for more. The government disapproves of the reason given for requesting additional challenges as a legal matter, but this does not mean that the challenge would not have been used if it had been available as a matter of fact. The most reasonable inference from the record is that the defense would have removed a prospective juror considered

unfavorable, hoping for the added benefit of placing prospective juror Olivas on the jury.[23]

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

BARBARA BERGMAN
Albuquerque, NM

DAVID A. REISER
Counsel of Record
PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
633 INDIANA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 628-1200

Of Counsel

Counsel for National Association of Criminal Defense Lawyers, Public Defender Service for the District of Columbia, and Federal Defender Association as Amici Curiae

October 1999

---

[23] This Court has never decided whether the non-discriminatory use of a peremptory challenge against a particular member of the venire is unconstitutional because the party was motivated in part by the hope of moving a member of a particular group into position to serve on the jury.